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No.: _____

IN THE

Supreme Court of the United States

October Term, 1988

MARTIN ROMAN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented*

1. Whether time excluded from the running of the "speedy trial clock" while an indictment is pending may be retroactively tolled as to a count of a superseding indictment that should have been, but was not, contained in the original indictment?

2. Whether prosecutorial vindictiveness - in adding a continuing criminal enterprise count because of petitioner's refusal to plead guilty to other charges - constitutes an independent basis for dismissing the indictment or, at the least, a basis for dismissing an indictment on Speedy Trial grounds with prejudice?

3. Whether a continuing criminal enterprise verdict should be reversed when it is unclear whether the jury unanimously found that petitioner acted in concert with and supervised the same five individuals?

4. Whether "substantial income or resources" should be determined under the "net income" or "gross income" standard, and whether the evidence was sufficient under either standard?

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* The first two "Questions Presented" set forth below were set forth in the prior petition for a writ of certiorari.

The position of the Solicitor General in opposing petitioner's previous petition was that that petition was "premature" because if petitioner was acquitted of the CCE charge at trial his contentions would be moot, whereas if he was convicted and his conviction affirmed on appeal he could raise these contentions in a petition seeking review of a final judgment (Memorandum for the United States in Opposition, at 2-3; Docket No. 87-516). It is petitioner's belief that the denial of the previous petition represented this Court's acceptance of this position. See, e.g., *United States v. MacDonald*, 435 U.S. 850 (1978). This belief is also based on the fact that the Solicitor General expressly noted that he was not responding to the merits of the petition, but would do so if this Court so requested (Memorandum for the United States in Opposition, *supra*, at 3, n. 1). This Court made no such request.

In sum, it is petitioner's belief that this Court has *not* previously reviewed the merits of petitioner's claims of prosecutorial vindictiveness and violation of the Speedy Trial Act, and will do so now.

5. Whether petitioner was entitled to an instruction to the jury that "if they can draw two inferences from the same testimony of a witness with regard to facts stated by that witness, and one is consistent with guilt and one is not consistent with guilt, they must draw the inference of lack of guilt from those facts"?

6. Whether the giving of an *Allen* charge was *per se* and/or on the facts of this case, plain and/or reversible error, and whether there was a waiver of that error in the trial court?

List of Parties

The only parties in the court below whose judgment is sought to be reviewed are those set forth in the caption of this case in this Court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion of the United States Court of Appeals affirming the judgment of conviction and sentence is not officially reported, and is set forth in Appendix A, pp. 1a-25a.

The decision of the United States District Court denying a renewed motion to dismiss the continuing criminal enterprise count of the indictment is not officially reported, and is set forth in Appendix B, pp. 26a-28a.

The opinion of the United States Court of Appeals reversing the District Court's previous grant of a motion to dismiss the continuing criminal enterprise count is

officially reported at 822 F.2d 261 (2d Cir. 1987), and is set forth in Appendix C, pp. 29a-41a.

The order of the United States Court of Appeals denying reargument and rehearing *en banc* is not officially reported, and is set forth in Appendix D, pp. 42a-43a.

The decision of the United States District Court granting the initial motion to dismiss the continuing criminal enterprise count of the indictment is officially reported at 646 F. Supp. 1568 (S.D.N.Y. 1986), and is set forth in Appendix E, pp. 44a-54a.

Jurisdiction

The judgment of the Court of Appeals was entered on March 13, 1989.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved

1. United States Constitution, Article 1, Section 9, Clause 3: "No ... *ex post facto* law shall be passed."

2. United States Constitution, Fifth Amendment: "No person shall ... be deprived of ... liberty ... without due process of law ...."

3. United States Constitution, Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial ...."

4. 18 U.S.C. § 3161: "Speedy trial ... [t]ime limits and exclusions.
(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an ... indictment shall commence within seventy days from the filing date ....
(h) The following periods of delay shall be excluded in computing the time within which an ... indictment must be filed, or ... within which the trial ... must commence:

(6) If the ... indictment is dismissed upon motion of the attorney for the Government, and thereafter a charge is filed against the defendant for the same offense, or an offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge."

5. Plan for Achieving Prompt Disposition of Criminal Cases - Southern District of New York.
Para. 4: "Time Within Which Trial Must Commence."
(a) Time Limits. The trial of a defendant shall commence not later than 70 days after ... (1) the date on which an indictment ... is filed in this district ....
(d) Superseding Charges. If, after a[n] ... indictment ... has been filed, a[n] ... indictment is filed which charges the defendant with th[e same] offense [charged in the prior indictment], ... (2) the trial shall commence within the time limit for commencement of trial on the original indictment ...."

6. 21 U.S.C. § 848: "Continuing Criminal Enterprise.

* * *

b. ... a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources."

Statement of the Case

Introduction

On May 6, 1986, petitioner was indicted for conspiracy, distribution, and possession of a controlled substance (86 Cr. 388, S.D.N.Y.). On September 5, 1986, a superseding indictment was filed, adding a continuing criminal enterprise (hereafter "CCE") count to the charges against petitioner (S 86 Cr. 388, S.D.N.Y.). Shortly thereafter, petitioner moved to dismiss the CCE count on grounds of prosecutorial vindictiveness and violation of the Speedy Trial Act, which motion was granted. The government appealed, however, and the Court of Appeals reversed the lower court and reinstated the CCE count. This Court denied a petition for a writ of certiorari. 109 S.Ct. 347 (1987).

Upon remand to the District Court, petitioner made a renewed motion to dismiss the CCE count on the ground that, as a matter of law, there was an insufficient showing that he had received "substantial income or resources" from the enterprise, as required by 21 U.S.C. § 848; the motion was denied. Petitioner proceeded to trial, was found guilty on all charges, and received a 15-year sentence on the CCE charge (and lesser, concurrent sentences on the other charges). On appeal, the Court of Appeals rejected all of petitioner's claims (including the preserved challenges to the CCE count made on the prior appeal), with the exception of "combining" the CCE conviction with the conspiracy conviction.

Accordingly, petitioner is once more seeking entry into this Court.

Statement of Facts

Petitioner was arrested on April 22, 1986 and charged with conspiracy to possess and distribute a controlled substance. During his arraignment and subsequent proceedings before the Magistrate on that charge, the prosecutor informed petitioner's counsel that unless

petitioner pleaded guilty to the conspiracy charge he might indict him on a CCE charge.[1] Defense counsel responded that petitioner had always denied his guilt, but that he would relate the prosecutor's statement to his client.

As predicted by defense counsel, petitioner maintained his innocence and the prosecutor presented the case to the Grand Jury. Although (as the prosecutor subsequently conceded and the District Court found, 646 F. Supp. at 1569, n. 1) the prosecutor possessed all of the evidence necessary for presentation of the CCE charge, he chose not to present this evidence to the Grand Jury; instead, on May 6, 1986, he secured an indictment (86 Cr. 388, S.D.N.Y.) charging only conspiracy, distribution, and possession.

After this indictment was returned, the prosecutor persisted in pressing petitioner to plead guilty and in holding the threat of indictment on the CCE charge over his head if he did not. Petitioner, however, continued to protest his innocence. Accordingly, on September 5, 1986, the prosecutor secured a superseding indictment (S 86 Cr. 388, S.D.N.Y.) adding a CCE count to the prior charges.

Shortly thereafter, defense counsel moved to dismiss the CCE charge on, *inter alia*, the ground that he had not been brought to trial within 70 days of the filing of the original indictment, and on the ground that the adding of the CCE count constituted prosecutorial vindictiveness.

The District Court agreed with the arguments. The court first held that the CCE charge was an offense "required to be joined" with the charges in the original indictment and that the "speedy trial clock" began

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[1] Upon conviction of the conspiracy charge, petitioner could have received a maximum sentence of 15 years and a fine of $25,000; upon conviction of the CCE charge, the maximum sentence petitioner could have received was life in prison (without possibility of parole), a fine of $100,000, and forfeiture of any and all profits from such enterprise. Compare 21 U.S.C. §§ 841(a)(1),(b)(1)(A) and 846 with 21 U.S.C. § 848(a)(1),(2).

running on the CCE charge as of the date of the filing of the original indictment. Next, the court held that time excluded from the running of that clock prior to the inception of the CCE count could not be "retroactively" applied to that charge; that holding was particularly required because of the prosecutor's deliberate delay in charging the CCE count and because an informed decision by counsel to request or acquiesce in an exclusion could only be made based on the charges then pending against his client. Since more than 70 days had passed since the filing of the original indictment, the CCE charge had to be dismissed. 646 F. Supp. at 1569-73.

The Court of Appeals reversed.[2] The court held that periods of time excluded under the initial indictment were to be retroactively applied to the CCE count of the superseding indictment, despite the fact that that charge had not been in existence when the prior exclusions had been made. 822 F.2d at 263-6.[3]

After this Court denied certiorari on the ground that any review would be premature, the case was remanded to the District Court. Petitioner again moved to dismiss the CCE count on a ground previously raised but not passed upon by the District Court in its prior opinion (646 F. Supp. at 1569, n. 1): that there was insufficient showing, as a matter of law, that he received "substantial income or resources" from the CCE; that renewed motion to dismiss was denied. See Appendix B, pp. 26a-28a.

Petitioner then proceeded to trial and was found guilty on all charges.

On appeal, petitioner raised, *inter alia*, the following issues: (1) that the evidence was insufficient, as a matter of law, to establish that he received "substantial income

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[2] On appeal by the prosecution, they did not challenge the District Court holdings that the CCE charge should have been brought as part of the original indictment or that the failure to do so started the speedy trial clock.

[3] Despite the District Court's reliance on the misconduct of the prosecutor, and despite the emphasis on that issue during and after oral argument, the decision of the Court of Appeals made no reference to this critical issue.

or resources" from the CCE and, in particular, that net profit rather than gross income had to be considered in determining whether petitioner received such "substantial income or resources"; (2) there was insufficient evidence to establish that petitioner acted in concert with and supervised five other persons, and that the jury may not have unanimously agreed on the same five persons; (3) that the refusal of the trial court to give an "equal inference" charge and the giving by the trial court of an *Allen* charge constituted reversible error.

The Court of Appeals rejected all of these arguments. Appendix A at pp. 1a-25a.

REASONS FOR GRANTING THE WRIT

POINT I

The Decision of the Second Circuit, Retroactively Applying Speedy Trial Exclusions to Counts of a Superseding Indictment Which Were Not in Existence at the Time the Exclusions Were Made, Conflicts in Fact and Principle With Other Decisions of That Court, With Decisions of Other Circuits, and With Decisions of Various State Courts.

As the District Court in this case correctly stated, acceptance of the "retroactive tolling" argument would require a trial court to go back over exclusions granted under a prior indictment and attempt to determine, *ex post facto*, whether defense counsel, the prosecutor and/or the court would have done whatever they had done that gave rise to the exclusions in the first place had they known that other, possibly more serious, charges would subsequently be brought in a superseding indictment. 646 F.Supp. at 1573, n.9. That would require precisely the "exercise in speculation" that numerous courts have held, in analogous situations, the parties "should not have to engage in." See, e.g., *United States v. Tunnessen*, 763 F.2d 74, 77-9 (2d Cir. 1985) ("Congress intended that the decision to grant [an exclusion] be prospective, not retroactive" in order to remove "the risk

that a district judge may simply rationalize his action long after the fact, in order to cure an unwitting violation of the Act"). See, also, *United States v. Carey*, 746 F.2d 228, 230 (4th Cir. 1984) ("Recent cases uniformly hold that *nunc pro tunc* or retroactive continuances that are made after the expiration of the time within which the defendant should have been tried for reasons the judge did not consider before lapse of the allowable time are inconsistent with the Act [citations omitted]"). And see, *United States v. Novak*, 715 F.2d 810, 820 (3d Cir. 1983) (Court invokes "supervisory powers" to require prospective rulings on exclusions). *Cf. United States v. Massino*, 784 F.2d 153, 159 (2d Cir. 1986) (record of sealing/delay in sealing should be made contemporaneously to avoid "after-the-fact explanations . . . and eliminate the need for courts to rely long after the fact upon the memory of agents as to the reasons for delay. *Cf. United States v. Tunnessen* . . .").[1]

Although these cases were cited to the Second Circuit, they were ignored by that court in its opinion. Instead, the court cited a series of prior cases in which exclusions under prior indictments were "routinely" applied to superseding indictments. 822 F.2d at 265. Those cases, however, are distinguishable on two grounds.

In the first place, it does not appear that the argument made in this case was made in those cases. Accordingly, those cases do not contain any *holdings* relevant to this case. *Cf. Cohens v. Virginia*, 19 U.S. 264, 399 (1821) (general expressions in prior cases must yield when precise point is later presented for decision).

Secondly, and perhaps of greater importance, it appears that the superseders in the cases cited by the Court of Appeals contained the same charges as the prior indictments; in such situations, petitioner concedes

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[1] Although *Tunnessen*, *Carey* and *Novak* dealt with the retroactive application of exclusions granted under the "ends of justice" section of the Speedy Trial Act (18 U.S.C. § 3161(h)[8]), the principle of those decisions is fully applicable to retroactive application of exclusions to new charges in superseding indictments, i.e., "after-the-fact" application of previously granted exclusions is simply improper.

that the prior exclusions carry over. In this case, however, the superseder contained a charge that was not, but should have been, in the prior indictment; as to that situation, petitioner contends that the prior exclusions do *not* carry over. The Second Circuit acknowledged that that situation had "*not* been previously discussed" (822 F.2d at 265), and petitioner contends that the Circuit's resolution thereof was not only not required by the cases it cited, but was also in conflict with the cases it ignored.

It also appears that the Second Circuit's ruling conflicts with decisions of the New York State courts. In *People v. Sinistaj*, 67 N.Y.2d 236 (1986), the Court of Appeals held that where new charges were contained in a superseding indictment, periods of time excluded under a prior indictment would *not* be applied to the new charges. *Id.* at 241, n.4. See also, *People v. Osgood*, 52 N.Y.2d 37, 43-4 (1980); *People v. Cruz*, 123 Misc.2d 316, 322 (S.Ct. N.Y.Co. 1984), *aff'd on this ground*, 111 A.D.2d 725, 726 (1st Dept. 1985); and *People v. Gelfand*, 131 Misc.2d 268, 279 (S.Ct. K.Co. 1986), in all of which exclusions under prior indictments were held inapplicable to new charges in superseding indictments.[5]

It is respectfully submitted that certiorari should be granted to resolve the foregoing conflicts.

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[5] Neither the Federal Speedy Trial Act nor the New York State legislation on speedy trial (Criminal Procedure Law Article 30) deals with the issue of superseders or retroactive application of prior exclusions to new charges therein, and both the state and federal courts relied on general legal principles to decide these issues. Accordingly, the state court decisions provide an acceptable basis for deciding this issue of federal law.

POINT II

The Decision of the Second Circuit Presents an Issue of Great Importance to the Administration of the Federal Criminal Law That Is Likely to Re-Occur and That Has Not Been Addressed by This Court.

As the Second Circuit conceded, the issue presented by this case — whether speedy trial exclusions made during the pendency of an indictment may be "retroactively" applied to new charges contained in a superseding indictment — is novel. 822 F.2d at 265. Despite its novelty, however, it is a question of great importance and is likely to re-occur.

It goes without saying that the proper construction of the federal Speedy Trial Act is obviously a matter of grave importance to the proper administration of the federal criminal law. While the lower courts may often be relied upon to perform that task, that is not the case here. In *United States v. Rojas-Contreras*, 106 S.Ct. 555 (1985), this Court (per Justices Blackmun and Brennan, concurring) noted that the "[Speedy Trial] Act nowhere refers to a superseding indictment." *Id.* at 559. Consequently, this Court had to grant certiorari to properly resolve an issue relating to such superseders. The same is true here.

Furthermore, while this case may present the first federal appellate decision in this area, the issue will definitely re-occur. Superseding indictments have become the rule, not the exception, and it is the rare federal case that is tried on the first indictment. See, e.g., COHEN, Superseding Indictments - New Device for Prosecutors, N.Y.L.J. August 14, 1987, p. 1, cols. 3-4. This practice is being followed in most states, whose speedy trial rules — having been modeled after the federal Act — also contain no reference to superseding indictments and no clear answers to the question raised by this case.

In sum, to forestall a host of possibly conflicting decisions, as well as to promptly decide this important

issue, this Court should grant certiorari. *Cf. Miller v. Florida*, 107 S.Ct. 2446 (1987) (certiorari granted to resolve issue of propriety of retroactive application of sentence guidelines to crime committed prior to enactment thereof).

It is also respectfully submitted that certiorari is particularly called for here because the Court of Appeals' decision is wrong.

A superseding indictment may contain one or more of three kinds of charges: the same charge that was in the original indictment and/or a related charge that was required to be joined with the prior charge and/or a completely new charge. *United States v. Rojas-Contreras, supra* at 559, n.1 (1985). As to the first type of charge, the 70-day trial clock (see 18 U.S.C. § 3161(c)[1]) is treated as though it began running when the original indictment was filed, and all of the exclusions thereunder carry over to the identical counts of the superseder. As to the last type of charge, a new 70-day clock begins to run from arraignment on the superseder, and the prior exclusions are not applicable to the new counts of the superseder. As to the remaining situation — the one involved in this case — the 70-day clock is treated as though it began running when the original indictment was filed, *but* the prior exclusions are inapplicable to the previously uncharged counts of the superseding indictment.

Such a hybrid solution is called for by virtue of the fact that this is a hybrid situation. On the one hand, the continuing criminal enterprise charge was an offense "required to be joined" with the conspiracy and substantive charges brought in the original indictment; therefore, it makes perfect sense that the 70-day clock runs from the date of the first indictment, as that is when the offense should have been charged (see, Plan for Prompt Disposition of Criminal Cases for the Southern District of New York, Para. 4(d)[2]). On the other hand, because it is a different offense than that with which the petitioner was previously charged, it also makes perfect sense not to retroactively apply to this new charge the exclusions granted while only the other charges were

pending. That is so because there is no basis for presuming that the circumstances that gave rise to the exclusions while only the former charges were pending would have given rise to those exclusions had the newly-charged offense then also existed. As a matter of fact, as petitioner's counsel contended and as the district court recognized, in many cases the exclusions would *not* have been requested, and/or acquiesced in, by the defense. 646 F.Supp. at 1573, n.9. ("Defendant has asserted, '[H]ad the CCE count existed from the beginning, defendant's entire posture would have changed . . .' It is possible, for example, that defendant would have moved for a severance under § 3161(h)(7). Defendant has also maintained that the presentation of his case would have been enhanced by a more expeditious trial on the CCE charge").

In sum, a defendant can only make intelligent decisions on how to prepare his defense based on the charges *then* in existence; in the context of this case, that means that a defendant can only determine how to proceed vis-a-vis requests for and/or acquiescence in Speedy Trial Act exclusions based on the charges in the indictment he is actually facing.

The Court of Appeals rejected petitioner's argument based on its reading of 18 U.S.C. § 3161(h)(6) and its holding that petitioner's position would force the prosecution to bring charges prematurely. 822 F.2d at 266. Neither of these grounds withstands analysis.

Section 3161(h)(6) merely provides that where an indictment is dismissed by the prosecution and a superseding indictment is subsequently filed, the time between these two events is excluded. That provision is irrelevant to this case for two reasons. First of all, the superseder here was filed while the original indictment was still pending so there was no hiatus period to exclude. Secondly, and perhaps of greater importance, that section simply has nothing to do with whether periods excluded under the first indictment can carry over to new charges in a superseder. See also, *Cohen*, *supra* (where government improperly tried to have indictment dismissed

under (h)(6) to avoid running of speedy trial clock motion would be denied).

The Court of Appeals' additional argument that acceptance of petitioner's position would force prosecutors to bring charges prematurely is both generally and specifically incorrect. Since the prosecutor controls the time when a case will be presented to a Grand Jury, and, therefore, the time when the speedy trial clock begins to run, there is simply no basis for any fear that charges will be prematurely brought. Even in those situations (rare in the federal courts) where an arrest precedes an indictment and requires indictment within a specified period of time, numerous provisions in the Speedy Trial Act provide for exclusions if additional time is necessary to prepare for indictment or trial. See, e.g., §§ 3161(h)(3), (6), (8). In any event, any generalized fear of premature prosecution has no place in this case where, as the District Court found, "the Government admitted that it would have been possible to bring the CCE charges at the same time as the original charges." 646 F.Supp. at 1509, n.1.

One last matter needs to be noted. Petitioner submits that there is something fundamentally improper in allowing a prosecutor to deliberately fail to request indictment on charges he has full knowledge of, to hold those charges over the head of a defendant who protests his innocence in an attempt to coerce a plea to lesser charges, and then to benefit from that misconduct by getting additional time to try the delayed charges. See, e.g., ABA Standards Relating to the Prosecution Function and the Defense Function, § 2.9(a) ("It is unprofessional conduct for a prosecutor intentionally to use procedural devices for delay for which there is no legitimate basis"), and Commentary thereto at 71-3.

The District Court found that such misconduct has occurred and based both the dismissal and the sanction ("with prejudice") thereon. 646 F.Supp. at 1569, n.1, 1573, n.9, and 1574, n.10. Furthermore, this matter was extensively briefed by both sides on appeal, consumed virtually the entire oral argument, and generated post-argument

submissions. It is respectfully submitted that the Court of Appeals' decision was silent on this matter because if it had been addressed the dismissal would had to have been upheld. See, e.g., *Blackledge v. Perry*, 417 U.S. 21 (1974) (superseding indictment must be dismissed where obtained to punish defendant for exercise of constitutional rights).

A recent article in the *New York Law Journal* pointed out a number of abuses (in addition to those present in the instant case) of the superseding indictment:

> The case best highlights the abuses of the superseding indictment process because the government (1) indicated, but did not want to proceed to trial; (ii) wanted to use the grand jury after indictment; (iii) sought to gain the benefit of investigating an already publicly maligned defendant; (iv) positioned defendants into a reluctance of talking to witnesses for fear of later claims that they were obstructing justice; and (v) utilized the defense's motions and responses to the initial indictment to prepare new charges without the earlier charging shortcomings.

COHEN, Superseding Indictments - New Devices for Prosecutors, N.Y.L.J. Aug. 14, 1987, p. 1, col. 3-4 (and p. 6, col. 5).

A grant of certiorari will enable the Court to also explore the effect of the Court of Appeals' speedy trial ruling on these other prosecutorial "tactics."

POINT III

The Second Circuit's Decision on the Elements of a Continuing Criminal Enterprise Charge Is in Conflict With Decisions of This Court and Other Circuits; In Addition, the Decision of the Second Circuit Presents Issues of Great Importance to the Administration of the Federal Criminal Law.

A conviction of operating a continuing criminal enterprise under 21 U.S.C. § 848(b) requires proof beyond a reasonable doubt that an individual acted in concert with five or more persons as to whom he occupied a supervisory position, and that such individual obtained substantial income or resources from the enterprise.[6] Petitioner contends that the evidence in this case did not establish those elements beyond a reasonable doubt and, further, that the trial court's instructions prevented a reviewing court from determining whether the jury properly found to the contrary.

A. The Verdict as to Acting in Concert and Supervision

It was, and is, petitioner's contention that there was insufficient credible evidence to establish that petitioner acted in concert with and supervised five persons. See Brief for Appellant Martin Roman, Dkt. No. 88-1283 (2d Cir.) at 21-8. However, assuming *arguendo*, the sufficiency of the evidence, there is simply no way of knowing whether the jury unanimously agreed as to which five persons fulfilled those requirements.

The Court of Appeals aptly stated the issue as follows:

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[6] The element of "acting in concert" is separate and distinct from the element of "supervising," and *both* must be proven. See, e.g., *United States v. Zavala*, 622 F. Supp. 319, 328 (N.D. Cal. 1985).

It should also be noted in passing that § 848 was amended after the acts in this case took place. See Public Law § 99-570. Needless to say, those amendments do not have any effect on this case, and (unless otherwise indicated) all references to § 848 are to that statute before these amendments.

> In its summation, the government argued that the evidence showed eight persons who acted with and were supervised by Roman. In its instructions, the court merely told the jury that it must 'unanimously agree on the identity of at least five persons with whom the defendant acted,' and that those five need not be among the persons mentioned in the superseding indictment. Since the jury returned a general verdict without answering special interrogatories, this Court has no way of determining which persons were viewed by the jury as Roman's underlings.

Appendix A at 14a.

In *Stromberg v. California*, 283 U.S. 359 (1931), this Court reiterated the general proposition that, where a conviction may rest upon an impermissible basis, a conviction may not stand despite the availability in the evidence of a valid basis for the conviction. Accordingly, where a jury was charged that they might find an accused guilty under any of three theories, and one theory was found invalid, the conviction could not stand, despite evidence of two valid bases for the conviction. *Id.* at 368-70. The same result has been consistently reached whenever this Court has had occasion to consider this matter. See, e.g., *Yates v. United States*, 354 U.S. 298, 311-12 (1957); *Williams v. North Carolina*, 317 U.S. 287, 291-2 (1942).

Of particular relevance here is *Cramer v. United States*, 325 U.S. 1 (1945). In that case, three overt acts were submitted to the jury, which rendered a general verdict. This Court held that if any *one* of the overt acts was improperly submitted, the entire verdict had to be set aside, citing *Stromberg*. *Id.* at 36, n. 45.

As it must, the Second Circuit has accepted the general proposition of the above cases. See, e.g., *Ingber v. Enzor*, 841 F.2d 450, 456 (2d Cir. 1988). Moreover, the Circuit specifically noted in this case that proof of acting in concert and supervision was "weakest" with regard to one Delestre and that it was *not* deciding whether

petitioner had acted in concert and supervised that individual. Appendix A at 19a. See, also, Appendix A at 17a ("the evidence was sufficient to permit the jury to infer that Roman acted in concert with *virtually* all of the ... men and was their supervisor") (emphasis added). Based on the foregoing, the Circuit should have reversed petitioner's CCE conviction because there is no way of knowing whether *all* of the jurors *unanimously* found beyond a reasonable doubt that petitioner acted in concert with and supervised the *same* five persons.

The Circuit refused to reverse, however, on the ground that petitioner waived this issue by failing to request an instruction to the jury not to consider those persons as to whom he regarded the evidence as insufficient, to object to the instructions to the jury, or to ask for special interrogatories. Appendix A at 14a-15a. There are two answers to the "waiver" argument.

In the first place, the record does not indicate that objection was made to the submission of an invalid instruction or possible ground of decision in the prior cases in this Court. See, e.g., *Stromberg v. California*, *supra*, 283 U.S. at 364 ("Appellant ... accepted this instruction as correct and waived any claim of error on that account"). And in the second place, even if this error was waived as a matter of law, it should still have been considered and reversed on the basis of plain error. See, e.g., *United States v. Frady*, 456 U.S. 152 (1982).

Based on the foreoging, certiorari should be granted. *Cf. McCulloch v. United States*, 108 S.Ct. 337 (1987) (Justices White and Brennan dissent from denial of certiorari on ground that issue of whether vacatur of some predicate-act convictions on appeal requires reversal of RICO conviction because jury's verdict did not indicate which predicate acts it relied on to find a "pattern of racketeering").

B. The Verdict As to Substantial Income or Resources

The third element that must be proven beyond a reasonable doubt in a CCE case is that the accused obtained "substantial income or resources" from the enterprise. 21 U.S.C. § 848(b)(2)(B). Petitioner contends that the standard for determining that element is "net income" rather than gross income, and that under either standard that element was *not* proven. Petitioner also contends that both of these issues are worthy of the granting of certiorari.

1) Standard for Determining Substantial Income or Resources

The Court of Appeals noted that 21 U.S.C. § 848(b)(2)(B) does not state whether "the jury's focus must be on the defendant's net profit from the operation rather than on the gross amounts of income received." Nevertheless, and without any analysis, the Court concluded that "the jury is entitled to consider the gross amount received," citing "generally" *United States v. Ayala*, 769 F.2d 98, 101-03 (2d Cir. 1985). Appendix A at 20a.

In the first place, the issue presented in this case was neither presented nor decided in *Ayala*, and the pages of the decision cited by the Second Circuit merely contain a listing of the enormous amounts of jewelry, drugs, and property owned by the owner of the enterprise.

Furthermore, 21 U.S.C. § 848 is commonly known as the "kingpin statute ... [which] targets the ring-leaders of large-scale narcotics operations." *United States v. Aiello*, 864 F.2d 257, 263 (2d Cir. 1988). Language such as that clearly contemplates that the persons against whom the statute is directed receive a large *profit* from the enterprise. Otherwise, the statute will be used to reach those as to whom it was *not* intended to apply. *Cf. United States v. Rivera*, 694 F. Supp. 1105, 1106-8 (S.N.Y. 1988) (Guidelines provided for sentence enhancement if accused

derived a "substantial portion of his income" from "pattern of criminal conduct"; held, "substantial portion of income" would be interpreted to require substantial net income, so as not to include casual low-level employees).

Moreover, an amendment to § 848(b) mandates life imprisonment for those supervisors who received $10 million dollars in "gross recepits" for any 12-month period. *See* Public Law § 99-570, § 1253(2). The presence in the new law of the term "gross receipts" clearly implies that the standard under the old law was "net receipts." For, when Congress intended that gross income or receipts be the standard, it showed no hesitation to include such a reference. See, e.g., 18 U.S.C. § 1955(b)(1) referring to gambling enterprise receiving "a gross revenue of $2,000 in any single day." And, see, *United States v. Reitano*, 862 F.2d 982, 985 (2d Cir. 1988) ("gross revenue" refers to total receipts, not net profits).

Respondent conceded that the purpose of the "substantial income" requirement was to exclude from § 848 "small-scale, occasional narcotics sales." Brief for the United States, Dkt. No. 88-1283 (2d Cir.) at 23. With the price of narcotics at thousands of dollars for miniscule amounts, the gross income standard would not serve that purpose. Accordingly, it is petitioner's contention that the statutory purpose will only be served by adoption of the "net" income standard.

2) Insubstantiality of Income or Resources

In *United States v. Ayala*, 769 F.2d 98, 103 (2d Cir. 1985), the Court of Appeals stated that although "neither the statute nor the case establish a minimum amount of 'income or resources' needed to make § 848 applicable ... some line inevitably must be drawn." Petitioner respectfully submits that this case falls below that line.

The undercover police officer testified that she expended a total of twenty-four thousand, seven hundred and ten dollars to purchase forty-seven and eighty-seven one-hundredths of heroin on *seven* different occasions over almost six months.

This sum must be reduced by the cost of the drugs to the seller. Although this amount is not known, there was no evidence that the organization bought large amounts of pure drugs and cut them itself; accordingly, the price paid by the organization must have been fairly high, thereby reducing its intermediate profits substantially.

These intermediate profits must be further reduced by amounts paid to underlings for salaries and/or commissions.[7] See, e.g., *United States v. Cruz*, 785 F.2d 399, 402 (2d Cir. 1986) (street sellers of $10 glassine envelopes[8] "earned a commission of 30 percent on the heroin they sold"; cutters and deliverers received "weekly salaries"); *United States v. Rhodes*, 779 F.2d 1019, 1023 (4th Cir. 1985) ($1,000 paid for delivery of drugs); *United States v. Jeffers*, 532 F.2d 1101, 1104-5 (7th Cir. 1976), *aff'd/rev'd on other grounds*, 432 U.S. 137 (1977) (street sellers of bags got 20 percent of sales, next level got unidentified "commission," "enforcers" received $200/week, cutters received $500/week, low-level managers received $1,000/week). While the precise amounts of these organizational expenses are not known here, they reduced the gross income by 75 percent in the *Jeffers* case, *supra*.

Last of all, whatever sum was left had to be split with any "partners." See, e.g., *United States v. Phillips*, 664 F.2d 971, 1035 (5th Cir. 1981) ("supervisor" had to split profits four ways); *United States v. Sisca*, 503 F.2d 1337, 1342, n. 6 (2d Cir. 1974) (listing breakdown of profit-sharing among "managers").

The trial court charged the jury that:

> [T]he statute clearly intended to exclude trivial amounts derived from casual narcotics sales ... [so i]f you determine that the defendant received only *small sums of money or other insignificant gain* from drug-related activity, you must find him not guilty of the charges in count two of the indictment" (Tr. 1120).

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[7] This was conceded by respondent (Tr. 869).

[8] The same envelopes as were sold here.

Under the above charge, neither the gross income nor the net profit allegedly received by petitioner satisfied the statute, and no case decided in the Second Circuit has found to the contrary. Compare, e.g., *United States v. Bueno-Risquet*, 799 F.2d 804 (2d Cir. 1986) (statute satisfied by multi-kilo sales of cocaine and heroin for more than $600,000 over three-year period); *United States v. Cruz*, *supra* (same re: $7,000-$8,000 *daily* sales of heroin and cocaine, plus multi-kilo importations); *United States v. Stratton*, 779 F.2d 820 (2d Cir. 1985) (same re: importation of eight tons of hashish at cost in excess of $1.3 million); *United States v. Osorio*, 757 F.2d 27 (2d Cir. 1985) (same re: 40-kilo importation); *United States v. Sisca*, *supra* (same re: "$5,000,000 a year corporate-like criminal enterprise which distributed 200 kilograms of heroin annually"); *United States v. Manfredi*, 488 F.2d 588 (2d Cir. 1973) (same re: "family narcotics business involved in distributing millions of dollars' worth of heroin and cocaine" over two-year period).

The other Circuits are in agreement. See, e.g., *United States v. Jones*, 801 F.2d 304 (8th Cir. 1986) (substantial income element satisfied by evidence of receipt of more than $400,000 for multi-kilo sales of amphetamines); *United States v. Rhodes*, 779 F.2d 1019 (4th Cir. 1985) (same re: multi-ton marijuana sales of more than $1 million); *United States v. Jeffers*, *supra* (same re: "net income of $10,000 per week over two-year and two-month period" to organization; supervisor's "income for the entire period totals over a million dollars").

No doubt respondent will attempt, as it did below (Tr. 869), to rely on the fact that petitioner had "in excess of two thousand dollars" when he was arrested. For several reasons, this attempt must fail.

In the first place, petitioner had a legitimate explanation for this money. Some of it represented the remains of his salary - paid in cash - from his jobs at the bar and at the repair shop, as well as his salary and tips from driving a taxi at night. The rest of the money represented the day's receipts from the bar and the repair shop - which the owners had told him to take home overnight if they were not there at the close of business.

Such sums are entirely consistent with non-drug-related activities. Compare, *United States v. Barnes*, 604 F.2d 121 (2d Cir. 1979) ($132,000 in cash in trunk of car).

Secondly, there was no evidence connecting this money to the previous drug transactions.

Third of all, nothing else was found in petitioner's car or apartment or anywhere else indicating either drug-related activity or drug-related wealth. Contrast, e.g., *United States v. Cruz*, *supra* (search of apartment revealed weapon, drugs, drug paraphernalia, and $12,125 in cash); *United States v. Stratton*, *supra* (appellant spent more than $1,000,000 for drugs and bought property worth over $200,000); *United States v. Young*, 745 F.2d 133 (2d Cir. 1984) ($1,379,240 in cash, $1,371,105 in jewels, two Mercedes-Benz cars, 29 fur coats, and two shotguns found in supervisor's "lavishly furnished home in Mount Vernon").[9]

In sum, the evidence established that petitioner received neither "substantial income [n]or resources" from the alleged drug sales. Accordingly, this case falls below the minimum "line [which] inevitably must be drawn" and this Court should "hold this proof sufficient." *United States v. Ayala*, *supra*.[10]

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[9] Petitioner was driving a *two-year-old Chevrolet* and had purchased a watch for himself and engagement ring for his wife for a *small down-payment many years earlier*. Clearly, these items were unconnected to the alleged drug sales. See, e.g., *United States v. Young*, *supra*, 745 F.2d at 764-5.

[10] The fact that the CCE count was hastily added in a superseding indictment to punish petitioner for insisting on his innocence of other charges may explain how such an obviously insufficient charge could have been brought.

Next to the death penalty, the maximum for violation of 21 U.S.C. § 848 - the continuing criminal enterprise statute - is the most severe in the federal criminal law, i.e., life imprisonment without benefit of parole. 21 U.S.C. § 848(a)(1),(c). Accordingly, errors in CCE cases should be generously reviewed by this Court. See, e.g., *United States v. Jeffers*, 432 U.S. 137 (1977).

POINT IV

The Decision of the Court of Appeals Upholding the Instructions to the Jury Is in Conflict With Decisions of This Court and Other Courts of Appeals.

A. Refusal to Charge on Equal Inferences

Defense counsel explicitly requested that the jury be instructed that "if they can draw two ... inferences from the same testimony of a witness with regard to facts stated by that witness, and ... one is consistent with guilt and one ... not consistent with guilt, they must accept and draw the inference of lack of guilt from those facts." The prosecutrix opposed the request and the trial court denied it (Tr. 976-8).

The prosecutrix had opposed the requested instruction in her requests to charge. The trial court, which had admitted that it was "greatly influenced by the proposed charges in Judge Sand's treatise" (Tr. 540), no doubt relied on Judge Sand's statement that this instruction had been rejected by this Court. See 1, Sand, Modern Federal Jury Instruction, at 6-4. And the Court of Appeals referred to this treatise in rejecting petitioner's argument on appeal. See, Appendix A at 22a. It is petitioner's contention that an examination of the authorities cited by the prosecutrix and Judge Sand will reveal that they do *not* suggest, much less require, rejection of the equal inference instruction.

Both the prosecutrix and Judge Sand cited *Holland v. United States*, 348 U.S. 121 (1954) as having "held" that this instruction is "confusing and incorrect." *Id.* at 140. However, an examination of *Holland* reveals that the above-quoted remark was directed, *not* at an equal inference charge, but at an instruction that "where the Government's proof is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt." *Id.* at 139. That instruction both invades the jury's province of generally determining whether the totality of evidence establishes guilt beyond a reasonable doubt and may mislead the jury into believing that the

burden of the prosecution in circumstantial evidence cases is *higher* than proof beyond a reasonable doubt. *Id.* at 140. *Cf. United States v. Praetorious*, 622 F.2d 1054, 1061 (2d Cir. 1979) (rejecting instruction that "If you find the evidence *as a whole* ... to be as consistent with innocence as with guilt, then you must find the defendant not guilty" because it suggested prosecutor's burden of proof was *less* than beyond a reasonable doubt) (emphasis added). Such instructions are vastly different from the one requested here, which merely tells the jury that if any given *piece* of testimony admits of no more than an equal inference of guilt or innocence, the latter inference (consistent with the presumption of innocence) must be drawn.

The prosecutrix and Judge Sand also cited *United States v. Pfingst*, 477 F.2d 177 (2d Cir. 1973) as having rejected the equal inference charge. However, *Pfingst* relied solely on *United States v. Grunberger*, 431 F.2d 1062 (2d Cir. 1970) and *Grunberger* merely rejected the application of the equal inference rule to *appellate review*. *Id.* at 1066. See, also, *United States v. Kahn*, 787 F.2d 28, 34 (2d Cir. 1986).

The foregoing is of more than academic interest for, had the requested instruction been given here, there is an excellent chance petitioner would have been acquitted (or, at the least, the jury would not have been dynamited into returning a verdict - see subd. B, *infra*). During the summation of the prosecutrix, she specifically noted that the jury was "equally" entitled to credit either petitioner's or the government's explanation of the money found in his possession at the time of his arrest; the lower court agreed that "there are two inferences that ... [can be] drawn: one against the defendant, and one that his explanation is accepted" (Tr. 869, 987). In view of the importance of this testimony to the prosecution's case and the fact that the jury repeatedly reported that it was deadlocked *without* the equal inference instruction, the giving of that instruction might well have led to either an irrevocable deadlock or an outright acquittal.

Based on the foregoing, the issue of whether this Court's decision in *Holland* bars an "equal inference" instruction merits the granting of certiorari.

B. *Allen* Charge

On the third day of deliberations, and after readbacks of a great deal of evidence and receipt of the entire charge (Tr. 1133-64), the jury reported that it was having a "problem" coming to a unanimous verdict and requested the court to give it "some advice" (Tr. 1165); the court gave the jury what it referred to as a "modified *Allen* charge" (Tr. 1169-72).

Several hours later, the jury reported that its "deadlock continues ... on the conspiracy charge. Without that, we feel the other charges can't be adequately considered"; in response, the court suspended deliberations for the weekend (Tr. 1174-7).

After it returned from the weekend, the jury deliberated on Monday with further readbacks of testimony and receipt of exhibits (Tr. 1178-89). Late that day, the jury sent in its penultimate note:

> Judge Leisure, since late Friday no one's position has changed. Each juror has had his say, and each has made his position clear. Despite having discussed the evidence in depth, and having reheard important testimony, no one's position has been shaken. We can't come to any unanimous decision. What next? (Tr. 1190).

The court sent the jury home and the next day delivered lengthy instructions, including quoting from this Court's opinion in the *Allen* case (Tr. 1196-9). Almost immediately afterward, the jury found petitioner guilty on all counts (Tr. 1199-1200).

The Court of Appeals found that petitioner had waived objection to the *Allen* charges and that those charges did not constitute plain error. Appendix A at 24a-25a.

Petitioner contends that the foregoing raises several "cert worthy" issues.

In the first place, petitioner respectfully requests that this Court resolve the conflict among the States and Federal Courts of Appeals on the continuing validity of the *Allen* charge *per se*. See, e.g., *United States v. Beattie*, 613 F.2d 762, 766 (9th Cir. 1980) (Browning, J., concurring and listing the courts that have "disapproved" the *Allen* charge); *People v. Gainer*, 566 P.2d 997, 1002-3, n. 7-8 (Cal. 1977) (en banc) (same). See, also, Marcus, *The Allen Instruction in Criminal Cases: Is the Dynamite Charge About to be Permanently Defused?*, 43 Mo. L. Rev. 613 (1978).

Secondly, if this Court is unwilling to ban the *Allen* charge *in toto*, this Court should still review the charge in *this* case.

Initially, it is petitioner's contention that the second *Allen* charge should never have been given at all. When the jury first indicated it was "having problems" and requested "advice," it was perfectly proper for the court to deliver the modified *Allen* charge it delivered. However, when the jury said that after (a) "having re-heard important testimony" (b) "having discussed the evidence in depth," and (c) "each juror has had his say and each has made his position clear," that (d) "no one's position has been shaken" and "since last Friday [four days earlier] no one's position has changed," and (e) "We *can't* come to any unanimous decision," it was improper and unduly coercive to dynamite the jury into a guilty verdict by delivering the second, and much more forceful and coercive, charge. The Court of Appeals refused to reverse on this ground, citing its holding in *United States v. Robinson*, 560 F.2d 507, 517 (2d Cir. 1977) (en banc) that multiple *Allen* charges were not improper. That holding is in clear conflict with *United States v. Seawell*, 550 F.2d 1159, 1163 (9th Cir. 1977) ("We conclude that as a sound rule of practice it is reversible error to *repeat* an *Allen* charge ... after a jury has reported itself deadlocked and has not itself requested a repetition of the instruction").

Moreover, the specific language of the second *Allen* charge was highly prejudicial. In particular, telling the jurors that the trial court was going to tell them what the *Supreme Court of the United States* had to say on the issue of deadlocked jurors was wholly improper as it clearly caused the jurors to defer to the pronouncement of this august Court. *Cf. Caldwell v. Mississippi*, 472 U.S. 320, 333 (1985) (reversible error to tell jurors highest court of state can correct any error in their decision). This was especially prejudicial here because *Allen* tells the dissenting jurors that they are *wrong* to disagree with the majority.[11] And the prejudice became overwhelming because the trial court failed to tell the *majority* that it, too, had a duty to re-examine its position, and failed to remind the jury of the all-important fact that the prosecution had the burden of proving guilt beyond a reasonable doubt. *Sand, supra*, at 9-30 and 9-31; *United States v. Webb*, 816 F.2d 1263, 1267 (8th Cir. 1987); *Potter v. United States*, 691 F.2d 1275, 1278-80 (8th Cir. 1982).

Last, but not least, the Court of Appeals' holding that petitioner waived this error is in conflict with prior decisions of the Court of Appeals (*Ingeber v. Enzor*, 841 F.2d 450 (2d Cir. 1988) and *United States v. Liguori*, 438 F.2d 663 (2d Cir. 1971), holding no waiver where counsel failed to raise an issue that had clearly been decided against him by a higher and controlling authority) and the Court of Appeals' related holding that *Allen*-charge errors are not plain error is in conflict with the decision of the Ninth Circuit in *United States v. Noah*, 594 F.2d 1303, 1304 (9th Cir. 1979).

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[11] Although *Allen* purported to be neutral - in that it was, in form, directed at dissenting jurors regardless of whether they were dissenting for acquittal or conviction - we know that it is really directed at a minority that is holding out for *acquittal* (Counsel has never heard of a jury returning a *not* guilty verdict after an *Allen* charge). That this was the case here is made clear by the fact that the jury returned a *guilty* verdict immediately after the charge was given. See, e.g., *United States v. Fossler*, 597 F.2d 478, 485 (5th Cir. 1979) (verdict set aside where jury deliberated "about an hour" after *Allen* charge).

Conclusion

FOR THE ABOVE-STATED REASONS, THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS SHOULD BE GRANTED, AND THE ORDER OF THAT COURT REVERSED.

Respectfully submitted,

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APPENDICES

Appendix A
Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 419—August Term, 1988

(Argued: November 16, 1988 Decided: March 13, 1989)

Docket No. 88-1283

UNITED STATES OF AMERICA,

Appellee,

—v.—

MARTIN ROMAN,

Defendant-Appellant.

Before:

FEINBERG, MESKILL, and KEARSE,

Circuit Judges.

Appeal from a judgment of conviction entered in the United States District Court for the Southern District of New York, Peter K. Leisure, *Judge*, for distribution of and conspiracy to distribute heroin, 21 U.S.C. §§ 812, 846, 845a, and 18 U.S.C. § 2; and continuing criminal enterprise, 21 U.S.C. § 848.

Affirmed in part, reversed and remanded in part.

Appendix A
Opinion of the United States Court of Appeals

MICHELE HIRSHMAN, Assistant United States Attorney, New York, New York (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Linda Imes, Assistant United States Attorney, New York, New York, on the brief), *for Appellee.*

JOEL A. BRENNER, East Northport, New York, *for Defendant-Appellant.*

KEARSE, *Circuit Judge*:

Defendant Martin Roman appeals from a judgment entered in the United States District Court for the Southern District of New York following a jury trial before Peter K. Leisure, *Judge*, convicting him on one count of conspiring to distribute and to possess with intent to distribute heroin, in violation of 21 U.S.C § 846 (1982) (count 1); one count of engaging in a continuing criminal enterprise ("CCE"), in violation of 21 U.S.C. § 848 (Supp IV 1986) (count 2); and six counts of distributing heroin within 1,000 feet of a public school, in violation of 21 U.S.C. §§ 812 and 845a (1982 & Supp. IV 1986) and 18 U.S.C. § 2 (1982) (counts 3-8). Roman was sentenced to concurrent prison terms of 15 years on each count; to consecutive special parole terms of six years on counts 3, 4, and 5; and to consecutive special parole terms of six years on counts 6, 7, and 8, to be served concurrently with the special parole terms on counts 3, 4, and 5. The court also imposed a special assessment of $50 on each count and a fine of $10,000.

Appendix A
Opinion of the United States Court of Appeals

On appeal, Roman contends principally that (1) the evidence was insufficient to convict him on any count because of the lack of credibility of the government's key witness, (2) his conviction on the CCE count must be reversed because, *inter alia*, the manner in which the case was submitted to the jury allowed the jury to reach a flawed verdict as to the persons he was alleged to have supervised in that enterprise, (3) the district court committed various errors in instructing the jury, and (4) his convictions on counts 1 and 3-8 must be combined with his conviction on count 2, because distribution and conspiracy are lesser included offenses within a continuing criminal enterprise. For the reasons below, we find merit only in the contention that Roman's convictions on counts 1 (conspiracy) and 2 (CCE) should have been combined, and we accordingly vacate the judgment in part and remand for that correction; in all other respects, we affirm the judgment of conviction.

I. BACKGROUND

Roman was initially indicted with nine codefendants on various charges relating to a heroin-distribution operation in the vicinity of E. 106th Street and Second Avenue in Manhattan ("E. 106th"). Following the entry of guilty pleas by most of the codefendants and the filing of a superseding indictment, Roman was tried alone on the charges described above.

A. *The Government's Case*

The government's proof at trial consisted principally of the testimony of Patricia Carter, a New York City Police detective who had been assigned to the New York Drug Enforcement Task Force ("Task Force"). Posing as a nar-

cotics dealer, Carter had made seven purchases of heroin in the E. 106th area during a five-month period, for prices totaling some $25,000. Taken in the light most favorable to the government, the evidence showed the following.

On October 10, 1985, Carter was introduced by a confidential informant to codefendant Cruz Camacho. Carter told Camacho she was interested in buying heroin at a discount from the E. 106th operation; Camacho told Carter he used to work for Roman, and he introduced Carter to Roman that day in front of an E. 106th grocery. Roman spoke little English and Carter spoke no Spanish; Camacho translated for them. Camacho told Roman that Carter wished to purchase two "bundles" of heroin at a discount. Bundles were understood to contain 25 glassine envelopes, or "bags," of heroin; the going rate for the E. 106th operation was $250 per bundle. After some discussion, Roman, Camacho, and Carter arrived at a price of $480 for the two bundles, which reflected a $20 discount.

Following these negotiations, Roman departed, instructing Carter and Camacho to wait on the street corner for Roman's man to bring a package. Soon thereafter, Roman reappeared and motioned Camacho and Carter toward him. At about the same time, he motioned for codefendant Jose Roig and spoke to him in Spanish. Roig then sent Camacho to a nearby parking lot to meet codefendant Georgio Martinez; Carter, who remained behind, observed Camacho in the parking lot giving Martinez the money in exchange for the heroin.

On October 16, 1985, Carter and Camacho went to a social club in the E. 106th area for Carter to attempt to purchase additional heroin from Roman. Outside of the club, Camacho recognized a man referred to by Carter at trial as John Doe Red Tee Shirt (hereafter "Red T");

Camacho assured Carter, in Red T's presence, that obtaining heroin from Roman would be possible since Red T worked for Roman and was selling Roman's "product." Red T told Camacho in Spanish that Roman was not around; however, Red T was able to supply Carter with the desired heroin for $480, the price set by Roman on October 10.

Carter returned to E. 106th alone on November 8 and November 14 but was unsuccessful in locating Roman. She did, however, meet another codefendant John Doe, who told her his name was "Ace" and stated that he knew Roman and saw him every day at 10 a.m. because Roman gave him samples to check out prior to offering the product for sale. On November 14, Carter told Ace she wanted to purchase two bundles and that in the near future she wanted to make a larger purchase. Ace promised to tell Roman about the large purchase; in the meantime, he directed Carter to codefendant Pedro Delestre. Carter and Delestre briefly discussed the appropriate price for the heroin, which Delestre set at $240 per bundle, reflecting the same discount Carter had obtained in her first two purchases. Carter and Delestre then met Martinez, who obtained two bundles and gave them to Delestre. Carter received the bundles from Delestre and paid Martinez $480 for them.

On November 19, Carter returned to E. 106th, again alone, and encountered Roman walking toward a parking lot. She told Roman she wanted to buy 20 bundles, again at a discount, and he responded by instructing her, in English, to speak with Roig. Roman called to Roig and spoke with him in Spanish. Roig then told Carter that he did not have that quantity of heroin and that he would not contact her when he did. Carter was about to leave when

Ace appeared and interceded. After speaking with Roig, Ace informed Carter that Roman did not want to deal with Carter because he had never dealt with her alone. After Carter said she would find Camacho to assist her in making additional purchases, Ace again conferred with Roig and reported back that Ace would do the deal for Roman, selling Carter the 20 bundles, and that Roman would not be present for fear that Carter was an undercover law enforcement officer. Carter, Ace, and Roig then went into the club, where Roig spoke with codefendant Michael Rivera. Rivera then departed, returning shortly with 20 bundles of heroin, for which Carter paid him $4,800. Ace and Roig helped Rivera count the money.

On December 4, Carter went to E. 106th and found Roman in a parking lot; she complained that her last purchase had been short one bag of heroin. In response, Roman told Carter to see Roig; accompanied by Ace, Carter went into the club in search of Roig. Inside they found Rivera and codefendant Juan Navedo. Navedo informed them that Roig was not expected that day, and upon being told by Carter that Roman had sent them, Navedo replied that Roig's absence was unimportant since "we all work for Martin [Roman]." Carter asked to purchase 25 bundles, and Rivera left to ascertain whether this was possible.

Rivera returned to inform Carter that 25 bundles would cost $6,000. Carter protested that the discount was inadequate in light of the volume. Navedo responded that the organization regularly sold 100 bundles to a customer from Connecticut for $240 a bundle. Carter lowered her request to 20 bundles, which Rivera agreed to sell for $4,800. While awaiting delivery, Carter and Ace went to an E. 106th bar called Christopher's, where Roman was

working as a bartender. On their way back to the club, Carter and Ace were informed by Navedo that the delivery would be further delayed. Rather than wait, Ace suggested that he and Carter return to Christopher's to talk with Roman. At Christopher's, Ace spoke to Roman in Spanish and then advised Carter that they would complete the transaction in Christopher's or in the parking lot because the authorities were in the area of the club. Ace departed Christopher's for a short time, returning with Navedo and Rivera. The three conversed with Roman in Spanish. Eventually, the sale was completed in the parking lot.

Carter next returned to E. 106th on February 25, 1986, and found only Rivera. She arranged with him the purchase of 30 bundles of heroin for February 27. At about that time Roman drove up and waved Carter over to speak with him. Carter told Roman of her desire to purchase 30 bundles and Roman assured her that she would have no problem and that he would give her a discount. Roman instructed Carter to come directly to him when she returned for the 30 bundles.

When Carter went back to E. 106th on February 27, Roman told her that Roig wished to handle the sale so that he could receive a portion of the profit. Consequently, Roman called Roig over, spoke with him, and asked Carter to wait. While Carter waited in her car, codefendant Adolfo Mangual arrived in the E. 106th area and met with Roman. After departing for a short time, Mangual returned and met with Roig in front of an auto repair garage; immediately thereafter, Roig summoned Carter into the club and told her the heroin was there. When Roig informed Carter that the price for 30 bundles would be $7,200, however, Carter objected, arguing that she should get a quantity discount, and offering $7,000. Roig stated

that he could not sell 30 bundles for that price, and he referred her to Roman. Carter promptly returned to Roman, who spoke to Roig, following which Roig informed Carter that he could sell her 30 bundles for $7,100. Carter agreed, and the transaction was consummated. After Carter left the E. 106th area, Roman, Roig, and Mangual were observed together in the garage, following which Mangual went from the garage into a nearby apartment complex carrying a paper bag.

Carter's final heroin purchase at E. 106th occurred on March 19, 1986. She met Roman at Christopher's and requested another 30 bundles of heroin. Roman responded that since Carter was buying another 30 bundles, he would give her a larger discount, charging only $235 per bundle. While Carter was waiting in her car for the heroin, she was approached by Roig and Martinez. Roig caused some confusion by stating that the price would be "75," which Carter interpreted to mean $7,500. Roman quickly arrived at the scene and assured Carter that Roig had meant $7,050, or $235 per bundle. Roman then instructed Carter to come with him, Roig, and Martinez. Carter and Roig eventually entered the club, where Roig counted the purchase money.

Upon leaving the club, Carter met codefendant Victor Fernandez, who informed Carter, in Roman's presence, that Fernandez would be making the heroin delivery; he told Carter to wait for him in a nearby restaurant. While Carter was waiting, Mangual drove up and parked his car in the garage next to the club; Fernandez shortly thereafter entered the restaurant and told Carter that her package had arrived. Minutes later, he delivered the bundles to Carter, who paid Roig for them. Martinez then came into

the restaurant and informed the group that the police were outside.

Immediately after Carter's departure from E. 106th, Task Force members observed Roman, Mangual, and several others conversing on the street. Mangual then crossed 106th Street, and he and an unidentified individual were seen doing something while leaning into the trunk of the individual's car; Mangual emerged with a white plastic bag and met again with Roman.

The E. 106th investigation concluded on April 22, 1986. Surveillance agents observed Roman and Mangual enter a parking lot and begin leafing through a notebook. After leaving the area for a short time, Mangual returned and spoke briefly with Roman. Mangual soon departed again and was followed down Second Avenue by Task Force agents who eventually motioned him to pull over to the curb. As the officers approached Mangual's car, they saw him attempt to throw something out of it, and they immediately placed him under arrest. They found in the passenger compartment of the car a box containing 2,375 bags of heroin. A later search of the trunk revealed a triple-beam scale and notebooks. Later that afternoon, Roman was arrested in an E. 106th parking lot; at the time of his arrest, he had in his possession $2,466 in cash.

B. *The Defense Case and the Verdict*

Roman testified in his own behalf. He stated that he had never sold drugs and had never received any money from the sale of drugs. He denied knowing Camacho and said that Carter had tried to discuss narcotics prices with him but he had always sent her away. He stated that Roig, Martinez, Rivera, Mangual, and Fernandez were drug dealers and that Ace was a drug addict. Roman stated that

his dealings with these men, however, were wholly innocent. Roman also testified that he worked at Christopher's and at the auto repair garage near the club and that part of the money in his possession at the time of his arrest was his own, and the rest belonged to the owners of Christopher's and the garage.

Roman also called several witnesses who testified, *inter alia*, that Roman spoke little or no English. A bilingual teacher gave his expert opinion that Roman was not capable of carrying on a conversation in English.

The jury found Roman guilty on all counts, and he was sentenced as described above.

II. DISCUSSION

On appeal, Roman challenges, *inter alia*, (1) the general sufficiency of the evidence to convict him, (2) the manner of submission to the jury of the elements of the CCE charge and the sufficiency of the evidence to support that charge, (3) the trial court's instructions to the jury, and (4) the court's failure to combine his distribution and conspiracy convictions with his CCE conviction. We have considered all of his contentions on appeal and find merit only in the contention that the conspiracy and CCE convictions should have been combined.

A. *The General Sufficiency of the Evidence*

Roman's general challenge to the sufficiency of the evidence focuses on the testimony of Carter. He contends that (1) Carter's testimony as a whole was unworthy of belief because it was largely uncorroborated, and (2) her testimony as to her conversations directly with Roman was incredible because Carter did not speak Spanish and

Roman neither spoke nor understood English. Neither contention has merit.

In challenging the sufficiency of the evidence on appeal, a defendant bears a heavy burden. *United States v. Esdaille*, 769 F.2d 104, 108 (2d Cir.), *cert. denied*, 474 U.S. 923 (1985). We must view the evidence in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80 (1942), and decide whether " 'the jury, drawing reasonable inferences from the evidence, may fairly and logically have concluded that the defendant was guilty beyond a reasonable doubt,' " *United States v. Buck*, 804 F.2d 239, 242 (2d Cir. 1986) (quoting *United States v. Carson*, 702 F.2d 351, 361 (2d Cir.), *cert. denied*, 462 U.S. 1108 (1983)); *see Jackson v. Virginia*, 443 U.S. 307, 319 (1979). In making this determination, we will not disturb the jury's findings with respect to the witnesses' credibility, *United States v. Stratton*, 779 F.2d 820, 828 (2d Cir. 1985), *cert. denied*, 476 U.S. 1162 (1986), for as we have said, the proper place for a challenge to a witness's credibility is "in cross-examination and in subsequent argument to the jury, not in an appellate brief." *United States v. Friedman*, 854 F.2d 535, 558 (2d Cir 1988).

Roman's argument that Carter's testimony was insufficient because it was uncorroborated is doubly flawed. First, though only Carter was able to testify to the substance of her conversations with the narcotics dealers, there was ample evidence that conversations had occurred and narcotics had been sold. Thus, surveillance agents testified to their observations of her encounters with Roman and his codefendants, and photographs and a videotape made by Task Force members showed Carter in the E. 106th area with Roman and others. Finally, bundles of

heroin purchased by Carter were admitted in evidence. Thus there was circumstantial corroboration for Carter's testimony that she had conversations with Roman leading to her purchases of heroin.

Second, any lack of corroboration goes only to the weight of the evidence, not to its sufficiency. The weight is a matter for argument to the jury, not a ground for reversal on appeal. *See Compton v. Luckenbach Overseas Corp.*, 425 F.2d 1130, 1132 & n.2 (2d Cir.), *cert. denied*, 400 U.S. 916 (1970). The testimony of Carter and the surveillance agents, the photographic proof showing Carter with Roman, and the heroin itself, plainly provided sufficient evidence from which a rational juror could conclude beyond a reasonable doubt that Roman was guilty of distributing and conspiring to distribute heroin.

Similarly, the decision whether or not to credit Carter's testimony with regard to her conversations with Roman, in light of the fact that she spoke no Spanish, was a matter entirely within the province of the jury. Carter explained at trial that her conversations in English with Roman were limited to narcotics matters. The proposition that Roman spoke some English was not inherently implausible, and indeed Roman himself provided corroboration for that proposition at trial. Although he testified through an interpreter, on one occasion he interrupted the interpreter to correct her translation, resulting in her changing the phrase "gas station" to "mechanic's shop"; and on another occasion, when the translation indicated that Roman played pool at the club, Roman added, in English, "a couple of times." Accordingly, the jury was easily entitled to infer that with respect to such matters as drug prices and quantities, Roman was capable of conversing in English well enough to communicate with Carter.

B. *The Continuing Criminal Enterprise Conviction*

In order to prove a person guilty of a continuing criminal enterprise offense under 21 U.S.C. § 848, the government must prove, *inter alia*, that he has committed a felony violation under 21 U.S.C. §§ 801-970 as part of a continuing series of violations under one or more of those sections

> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

21 U.S.C. § 848(d). Roman challenges his CCE conviction principally on the grounds (1) that there was insufficient evidence to establish that he acted in concert with and supervised at least five other persons and derived substantial income from the enterprise, and (2) that the manner in which the case was submitted to the jury makes it impossible to know which five individuals the jury found to be his underlings. He also contends that his sentence on this count should have been combined with his sentences on the conspiracy and substantive counts of which he was convicted.

1. *The Evidence and Verdict as to Five Supervisees*

We turn first to the interrelated questions of whether there was sufficient proof that Roman acted in concert with five persons whom he managed or supervised in the narcotics operation, and whether the manner in which the

case was submitted to the jury permits us adequately to review the jury's verdict on this issue.

In its summation, the government argued that the evidence showed eight persons who acted with and were supervised by Roman. In its instructions, the court merely told the jury that it must "unanimously agree on the identity of at least five persons with whom the defendant acted," and that those five need not be among the persons mentioned in the superseding indictment. Since the jury returned a general verdict without answering special interrogatories, this Court has no way of determining which persons were viewed by the jury as Roman's underlings. Roman contends that the lack of specificity in the verdict is ground for reversal of his CCE conviction because the jury may have counted among the required five persons a person as to whom the evidence was insufficient. We disagree that the form of the verdict and the manner in which the case was submitted to the jury require a reversal in this case.

In general, it is the defendant's responsibility to take steps to see that the arguments he would make in the appellate court are adequately preserved at trial. Where the defendant believes that certain alternative bases on which the jury might rely are impermissible because of an insufficiency of evidence, he "must request the trial judge not to submit the invalid basis to the jury or else the objection will be deemed waived." *United States v. Washington*, 861 F.2d 350, 352 (2d Cir. 1988). With respect to a charge of continuing criminal enterprise, we have indicated that it is incumbent on the defendant to request an instruction that the jury is not to consider those persons as to whom he regards the evidence of supervision as insufficient, *see United States v. Wilkinson*, 754 F.2d 1427, 1432

(2d Cir.), *cert. denied*, 47[illegible] U.S. 1019 (1985), or at the very least to make an explicit objection to the trial court's instructing the jury that it may consider such persons, *see id.*; *United States v. Stratton*, 779 F.2d at 827.

As an alternative, the defendant may preserve his claim that certain bases are impermissible by requesting that the jury be given interrogatories that will require it to identify the basis for its verdict if that verdict is one of guilt. Although as a general matter special interrogatories to juries in criminal cases are disfavored, *see generally United States v. Coonan*, 839 F.2d 886, 891 (2d Cir. 1988); *United States v. Ruggiero*, 726 F.2d 913, 926-27 (2d Cir.) (Newman, *J.*, concurring in part and dissenting in part), *cert. denied*, 469 U.S. 831 (1984), we have indicated that where the offense charged requires proof of a specific number of predicate facts and the nature of the proof at trial warrants it, the trial court would be well advised to submit to the jury interrogatories that would allow an assessment of whether the jury's determination of guilt rested on permissible bases. *See, e.g., United States v. Ruggiero*, 726 F.2d at 922-23.

In the present case, Roman followed none of these routes to preservation of the present issue for review. He neither objected to the CCE portion of the district court's instruction nor requested that the jury be given a special interrogatory requiring identification of the five persons on whom it agreed. Nor did he request an instruction that would have limited the jury's consideration to specified individuals as to whom he did not contend the evidence was insufficient. We conclude that he has waived his right to challenge the manner in which the case was submitted to the jury. In these circumstances, his contention that the evidence was insufficient to show that he supervised at

least five persons must be rejected if the evidence was sufficient as to any five of the persons as to whom proof was adduced at trial.

In assessing the sufficiency of the evidence to support the verdict that Roman supervised or managed at least five others, we note that generally a management or supervisory relationship within the meaning of § 848 is "created when one person gives orders or directions to another person who carries them out." *United States v. Stratton*, 779 F.2d at 827. The defendant on a CCE charge need not "have been the *dominant* organizer or manager as long as she was in a managerial position with respect to five other persons," *United States v. Wilkinson*, 754 F.2d at 1431 (emphasis in original); nor does the statute require proof that there was "personal contact between the leader and each underling," *United States v. Cruz*, 785 F.2d 399, 407 (2d Cir. 1986), or that all of the claimed relationships were of the same type or existed at the same moment in time, *United States v. Mannino*, 635 F.2d 110, 116-17 (2d Cir. 1980). Thus, the requisite associations and relationships may be found even in loosely structured enterprises. Finally, we note also that in any review of the record for sufficiency, " 'pieces of evidence must be viewed not in isolation but in conjunction.' " *United States v. Brown*, 776 F.2d 397, 403 (2d Cir. 1985) (quoting *United States v. Geaney*, 417 F.2d 1116, 1121 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970)), *cert. denied*, 475 U.S. 1141 (1986).

In the present case, the eight persons whom the government argued to the jury were supervised by Roman were Roig, Martinez, Red T, Ace, Delestre, Rivera, Navedo, and Mangual. In addition, the government argues on appeal that though Fernandez was not mentioned in its summation, the jury was entitled to find that Roman

supervised him as well. We conclude that, viewing the record in the light most favorable to the government, the evidence was sufficient to permit the jury to infer that Roman acted in concert with virtually all of these men and was their supervisor. The evidence included the following.

There was ample proof that Roman directed Roig in the heroin-distribution operation. He repeatedly summoned Roig to do the deals with Carter or referred Carter to Roig for negotiations. That Roman was Roig's superior was plain from, *inter alia*, the events of February 27, when Roig was unable to grant Carter the discount she sought until Roman gave his approval. In addition, the men directed by Roig could properly be deemed to be under Roman's management. For example, after Roman agreed to sell Carter the first two bundles of heroin, he summoned Roig; Roig then directed Martinez to deliver these two bundles to Camacho and receive payment for them. The jury was entitled to find that Martinez was indirectly supervised by Roman. Further, in the March 19, 1986 transaction, Roman dealt directly with both Roig and Martinez. Roig had the role of treasurer, entering the club to count the purchase money; Martinez remained outside and eventually warned those who had gone to the restaurant that the police had arrived.

Though Roig obviously was Roman's principal sales representative, several others participated in sales that the jury could infer were sales for Roman. Red T sold Carter two bundles of heroin; the price was the same as that negotiated by Roman, and Camacho told Carter, in Red T's presence, that Red T was selling Roman's product. Navedo, on another occasion, told Carter she would be able to make her purchase notwithstanding Roig's absence because they all "work[ed] for" Roman. Navedo pro-

ceeded to assist Rivera to resist Carter's request for a larger discount than $10 per bundle, telling her that even their regular buyer from Connecticut paid $240 per bundle for 100 bundles. Rivera, who participated in this and other sales, plainly was a member of the organization, as he ascertained the availability of the quantity Carter desired and communicated the price, which was the same price given Carter by Roman. In connection with the December 4 sale, Rivera, Ace, and Navedo conferred with Roman prior to the actual delivery of the heroin to Carter.

Ace performed a variety of jobs for the Roman organization, including testing samples for Roman each day and acting as a lookout. Ace and Rivera also made a sale to Carter for Roman on November 19, 1985, when Roman was reluctant to deal with her directly for fear that she might be an undercover law enforcement agent. Though Roman argues that his reluctance to deal on November 19 showed that he was not involved, the record indicates otherwise, for when Carter later complained to Roman that the quantity she had received on that occasion was one bag short, Roman did not disavow involvement but rather referred her to Roig, who clearly was his major sales assistant. Thus, Roman's own action confirmed that the sale Ace and Rivera made on November 19 was, as Ace had said, "for" Roman.

The organization also obviously used two delivery men in addition to Martinez and Rivera. Fernandez, in Roman's presence, told Carter on March 19 that he would deliver the heroin she had just bought through Roig, *i.e.*, the heroin whose price Roman had just authorized Roig to discount. The nature and timing of the acts of Mangual, observed by Task Force agents, also permitted the jury to infer that he was a courier or warehouseman for the orga-

nization. He carried various bags into and out of the E. 106th area, and twice when Carter had been told to wait after agreeing to a purchase, Mangual's subsequent arrival at E. 106th was followed closely by an announcement to Carter that her heroin had arrived. On the final day of the surveillance, Mangual was observed with Roman, perusing a notebook; and a short time later, Mangual was arrested with notebooks and 2,375 bags of heroin in his possession. Plainly the evidence was sufficient to support a finding that Mangual was a participant in Roman's organization, and the jury was free to infer that Mangual the courier was subordinate to Roman the decisionmaker.

The weakest proof in the case related to the role of Delestre, who once sold Carter two bundles of heroin in the absence of Roman and Roig. We think the evidence sufficient to support an inference that Delestre was part of Roman's organization, since the sale was made at the price previously set by Roman, and the person who fetched and delivered the heroin for Delestre was Martinez, who clearly was an integral part of Roman's organization. Though there was no direct evidence of Delestre's rank in the organization relative to that of Roman, the jury might reasonably infer in part from Navedo's statement that "all" members of the organization worked "for" Roman, that Delestre too was managed by Roman. Nonetheless, we need not reach the question of the sufficiency of the evidence that Roman managed or supervised Delestre, since we think it plain that the evidence was sufficient to support a finding by the jury that Roman managed or supervised eight others.

2. *The Evidence of Substantial Income to Roman*

Roman's contention that the evidence was insufficient to support a finding that he gained substantial income

from unlawful narcotics transactions need not detain us long. Section 848 was "added in 1970 in order to provide severe penalties for kingpins in the drug trade," *United States v. Ayala*, 769 F.2d 98, 102 (2d Cir. 1985) (citing H. Rep. No. 1444, 91st Cong., 2d Sess. 10, *reprinted in* 1970 U.S. Code Cong. & Admin. News 4566, 4575-76), and its requirement that the defendant's gain from such a series of transactions be "substantial" is designed to "exclude trivial amounts derived from occasional drug sales," *United States v. Losada*, 674 F.2d 167, 173 (2d Cir.), *cert. denied*, 457 U.S. 1125 (1982). The statute does not, however, set a minimum amount necessary to show "substantial" income. Nor does it state that the jury's focus must be on the defendant's net profit from the operation rather than on the gross amounts of income received.

In determining whether the defendant's income has been substantial, the jury is entitled to consider both direct evidence of a defendant's wealth, *see id.*, and circumstantial evidence, such as a defendant's position as the head of a large hierarchical drug operation, *see United States v. Ayala*, 769 F.2d at 102-03; *see also United States v. Sisca*, 503 F.2d 1337, 1346 (2d Cir.) (substantiality shown by "enormous quantity of narcotics involved" and "substantial sums of money changing hands"), *cert. denied*, 419 U.S. 1008 (1974). Moneys received by the defendant's underlings may be considered constructively received by the defendant, and the jury is entitled to consider the gross amount received, notwithstanding the defendant's argument that some portion of the gross income must be paid out to others. *See generally United States v. Ayala*, 769 F.2d at 101-03.

There was ample evidence here from which the jury could conclude that Roman's gross income from his nar-

cotics business was substantial. The evidence from which it could draw this inference included (a) the size of Roman's organization, which comprised as discussed above, at least nine men; (b) the volume of sales made to Carter alone, which totaled more than $25,000 in five months; (c) coconspirator statements indicating that the organization made substantial other sales, including regular sales of $24,000 worth of heroin to a single customer from Connecticut; and (d) Roman's having nearly $2,500 in cash in his pocket when he was arrested. Though Roman suggests that other inferences could have been drawn regarding various pieces of this evidence, the jury was entitled to infer from the record as a whole that Roman's income from narcotics dealing was substantial.

3. *Combining the CCE Conviction with Other Counts*

Roman contends that his convictions on the conspiracy and distributions counts (counts 1 and 3-8) must be combined with his conviction on the CCE count (count 2), because the former offenses are included within the latter. The government concedes that the conspiracy conviction should be combined with the CCE conviction, but disputes Roman's contention with respect to the distribution convictions. We agree that the convictions on counts 1 and 2 should be combined.

We have ruled that conspiracy in violation of 21 U.S.C. § 846 constitutes a lesser included offense of a CCE charge, and thus, a conviction for § 846 conspiracy should be "combined" with a CCE conviction. *United States v. Osorio Estrada*, 751 F.2d 128, 134-35 (2d Cir. 1984), *cert. denied*, 474 U.S. 830 (1985). With respect to substantive narcotics violations, however, we have held otherwise, ruling that "the cumulative sentences under the substantive

counts must survive." *United States v. Wilkinson*, 754 F.2d at 1432. Accordingly, the judgment with respect to counts 3-8 was proper, but we remand to the district court for correction of the judgment to combine the convictions on counts 1 and 2.

C. *The Challenges to the Jury Instructions*

Roman makes two challenges to the trial court's charge to the jury, contending that one instruction he requested should have been given and that an *Allen* charge, *see Allen v. United States*, 164 U.S. 492 (1896), delivered by the court should not have been given. We find no merit in either contention.

1. *The Requested Equal-Inference Instruction*

Roman asked the trial court to instruct the jury that

> if they can draw two or more inferences from the same testimony of a witness with regard to facts stated by that witness, and that one is consistent with guilt and one . . . not consistent with guilt, they must accept and draw the inference of lack of guilt from those facts.

The refusal to give this charge was not error, for this instruction would improperly have required the jury to consider the testimony of each witness in isolation. Plainly the jury is entitled to consider the evidence in its entirety and to evaluate whether the testimony of a given witness is plausible in light of other evidence in the record. *See, e.g.*, 1 L. Sand, J. Siffert, W. Loughlin & S. Reiss, *Modern Federal Jury Instructions* ¶ 5.01, at 5-8 (1988) ("important to emphasize that the defendant's guilt be determined on the basis of 'all of the evidence in the case' ").

2. *The* Allen *Charge*

The jury began its deliberations late on Thursday, April 28, 1988. On Saturday afternoon, the jury sent the following note to the court:

> [W]e feel we have discussed the relevant issues thoroughly and are having a problem coming to any unanimous agreement. Can you give us some advice?

After consultation, the court and counsel for the parties agreed that it was too early in the deliberations for an actual *Allen* charge urging the jury to attempt to reach a verdict, *see Allen v. United States*, 164 U.S. 492. Accordingly, though indicating that a full *Allen* charge might eventually become necessary, the court responded to this first note by giving what it called a "modified" *Allen* charge, simply rereading the portion of the charge that explained the rules for deliberation and reminding the jury to consider each count separately.

On Monday evening, the jury sent the court another note. It stated that

> since late Friday, no one's position has changed. Each juror has had his say, and each has made his position clear. Despite having discussed the evidence in depth, and having reheard important testimony, no one's position has been shaken. We can't come to any unanimous decision. What's next?

After receiving this note, the court concluded that an *Allen* charge was called for, and it submitted a proposed instruction to counsel. On Tuesday, with Roman not objecting either to the giving of the charge or to its language, the court instructed the jury, in pertinent part, as follows:

> It is desirable if a verdict can be reached, but your verdict must reflect the conscientious judgment of each juror, and under no circumstance must any juror yield his or her conscientious judgment.
>
> . . . .
>
> . . . [N]o juror must vote for any verdict unless, after full discussion, consideration of the issues and exchanging of views, it does represent his or her considered judgment.

The court followed by reading language from *Allen* and sent the jury back for more deliberations. Some three hours later, the jury returned its verdict, convicting Roman on all counts submitted to it.

Roman contends that he is entitled to a new trial on the ground that the court's full *Allen* charge improperly coerced the jurors into reaching a guilty verdict. We reject this contention. Since Roman failed to object to the charge, it is ground for reversal only if it constituted "[p]lain error[ ]," Fed. R. Crim. P. 52(b), and we find no plain error here.

This Circuit has viewed "[t]he propriety of an *Allen*-type charge [as] depend[ing] on whether it tends to coerce undecided jurors into reaching a verdict by abandoning without reason conscientiously held doubts." *United States v. Robinson*, 560 F.2d 507, 517 (2d Cir. 1977) (en banc), *cert. denied*, 435 U.S. 905 (1978). And though we have recognized that "the chances of coercion may increase with each successive appeal by the court to the jurors to try to reach a verdict," we have been "unwilling to hold that a second *Allen*-type charge is error *per se*." *Id.*

In the present case, the substance of the *Allen* charge read in response to the jury's second note was entirely proper. Further, this was the first real *Allen* charge, since the court's response to the jury's prior note was merely a clarification of the jurors' individual responsibilities without an exhortation that they reach a decision. Given the fact that even a second charge imploring a decision would not be *per se* error, we hold that the court's delivery of this correct and unobjected-to *Allen* charge cannot be deemed plain error.

CONCLUSION

We have considered all of Roman's arguments on appeal and, except to the extent indicated above, conclude that they are without merit and do not require discussion. The judgment is vacated in part and remanded for entry of a new judgment combining the convictions on counts 1 and 2; in all other respects, the judgment of conviction is affirmed.

Appendix B
Decision of United States District Court

THE COURT: Defendant Martin Roman moves this court to dismiss Count 2 of the indictment, which alleges that defendant Roman occupied a position of organizer, supervisor and manager in a continuing criminal enterprise from which he obtained substantial income and resources, 21 U.S.C. Section 848.

Roman claims that the alleged violations carried on by the continuing criminal enterprise could not have produced "substantial" income for the plaintiff. Roman suggests that the alleged violations listed in Counts 3, 5, 6, 7, 8 and 9 of the indictment involve drug sales valued at a total of $24,710.

It is well established in this circuit that section 848, "Does not prescribe the minimum amount of money required to constitute 'substantial' income, but the language clearly was intended to exclude trivial amounts derived from occasional drug sales."

United States against Losada, 674 F.2d 167 (2d Cir. 1982). In that case the Court of Appeals held that the defendant could be found to derive substantial income despite the fact that she claimed to have received only $2,000 over a four year period. The court explained that, "The jury was entitled to credit the government's evidence regarding her income and spending habits, as well as all reasonable inferences to be drawn therefrom. She received large sums of money and paid substantial amounts for school tuition, bail, attorneys' fees, clothing, jewelry, a house in Colombia and several expensive airline tickets -- all far in excess of her legimate income." *Id.,* 674 F.2d at 173.

But the court also observed that, "Even if we were to accept the $2,000 figure suggested by Rosalinda as her

income from cocaine sales, that is not so insignificant as to render the statute inapplicable." *Id.*

More recently, in *United States against Ayala,* 769 F.2d 98 (2d Cir. 1985) the Court of Appeals elaborated on the meaning of "substantial" in the context of the continuing criminal enterprise statute. There Judge Winter, writing for the court, explained that, "Substantial income or resources" could be measured only by concrete indicia of wealth, but also by circumstantial evidence of a defendant's position within the continuing criminal enterprise. *Id.* at 102.

In that case, one defendant was found at trial to have $2,000 in cash, attributable to himself or himself and his co-defendant; $2,000 in cash and $6,000 in savings from his apartment; drug records indicating gross sales of $33,000 over a ten day period; 36 grams of heroin; and substantial productive assets useful in the sale of narcotics. That defendant also occupied the top position in the enterprise hierachy. The court ruled that based on both dire[illegible] and circumstantial evidence, a jury could find that the defended [sic] derived "substantial income or resources."

The second defendant in *Ayala* received a "cut" of the sales of a certain drug, of which $3,800 of those sales were made by this defendant; that defendant also was wearing a mink coat at the time he was arrested; and $2,000 and a car were sized [sic] when the two defendant's [sic] were arrested. Moreover, the second defendant was not a leader of the enterprise, but merely an errand boy.

The court determined that this evidence was insufficient to satisfy the substantial income element; the

court stated that as to the first defendant, "We permitted an inference of (substantial income) to be drawn from his dominant position in a large hierarchial operation, distributing an exclusive brand of heroin." As to the second defendant, however, the court found, "There is no such evidence that (this defendant) played such a role . . . . and the direct evidence of (his) income or wealth is clearly insufficient." *Id.* at 102-103.

Count 2 of the indictment in this case charges that defendant Roman managed and organized a continuing criminal enterprise that sold over $24,000 of narcotics from October 1985 to March 1986. It cannot be said that the indictment fails to make allegations which, if proven at trial, would preclude a jury from determining, based upon both direct and circumstantial evidence, that defendant Roman derived substantial income or resources from the continuing criminal enterprise.

Therefore, based on the papers that have been submitted to the court by the defendant and by the government, based on further oral argument heard today, the application of the defendant Roman with respect to point two of his original motion is denied.

Appendix C
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 948—August Term 1986

Argued: March 31, 1987 Decided: June 22, 1987

Docket No. 86-1521

UNITED STATES OF AMERICA,

Appellant,

—against—

MARTIN ROMAN,

Defendant-Appellee.

Before:

FEINBERG, PRATT, and ALTIMARI,

Circuit Judges.

Interlocutory appeal from an order entered November 14, 1986, in the Southern District of New York, Peter K. Leisure, *Judge*, dismissing with prejudice, on speedy trial grounds, one count of a superseding indictment.

Reversed and remanded.

Appendix C
Opinion of United States Court of Appeals

BRUCE A. BAIRD, New York, NY, Assistant United States Attorney for the Southern District of New York (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Aaron R. Marcu, Assistant United States Attorney, of Counsel), *for Appellant*.

JOEL A. BRENNER, New York, NY (Kenneth Joelson, Bobick, Joelson & Rochkind, New York, NY, of Counsel), *for Defendant-Appellee*.

PRATT, *Circuit Judge*:

The United States of America appeals, pursuant to 18 U.S.C. § 3731, from an order of the United States District Court for the Southern District of New York, Leisure, *J.*, dismissing with prejudice, on speedy trial grounds, one count of a superseding indictment charging appellee Martin Roman with managing a continuing criminal enterprise ("CCE") to distribute heroin in violation of 21 U.S.C. § 848. Roman moved to dismiss the CCE charge, which was first asserted as part of the superseding indictment, on the ground that his right to be tried within 70 days following arraignment on the original indictment had been violated, even though, due to certain exclusions, the speedy trial clock had not yet run out on the original indictment.

The district court concluded that the CCE charge was "required to be joined with" the conspiracy charge of the

original indictment, and that the 70-day speedy trial clock therefore commenced to run on the CCE charge with the date of arraignment on the original indictment, but that the exclusions of time under 18 U.S.C. § 3161(h), which had been applied to the original indictment, should not be applied to the additional CCE charge in the superseding indictment. Accordingly, the district court dismissed the CCE count with prejudice. For the reasons set forth below, we reverse and remand.

BACKGROUND

On May 6, 1986, the grand jury returned against Martin Roman an eight count indictment charging him with conspiring to distribute and possess with intent to distribute heroin, in violation of 21 U.S.C. § 846, and with distributing and possessing with intent to distribute heroin in violation of 21 U.S.C. § 841(b)(1)(B). Roman was arraigned on May 15, 1986.

While the original indictment was pending, various periods of time were excluded from the 70-day period within which the Speedy Trial Act, 18 U.S.C. § 3161(c)(1), requires trial to commence. The exclusions were granted because some of Roman's co-defendants were unavailable and because defendants made several pretrial motions.

On September 5, 1986, when 48 days still remained on the speedy trial clock, the grand jury returned a superseding indictment that essentially restated the original charges against Roman and added, in count two, a charge of managing a continuing criminal enterprise engaged in the distribution of heroin, in violation of 21 U.S.C.

§ 848. The conspiracy and distribution charges remained as independent counts and were also incorporated in the new CCE charge as predicate acts.

On October 1, 1986, Roman moved to dismiss the new count two on the ground that 70 speedy trial days had passed without the commencement of trial. 18 U.S.C. § 3161(c)(1). He argued that the CCE count was an offense required to be joined with the charges in the original indictment and that he was, therefore, entitled to be tried on that count within 70 days of his arraignment on the original charges.

In opposition the government argued first that the speedy trial clock did not begin to run with respect to the CCE count until the superseding indictment was filed. Alternatively, the government argued that even if the 70-day period for the CCE charge began to run when Roman was arraigned on the original charge, the time exclusions that had been applied to the charges in the original indictment should apply as well to the superseding indictment.

Roman conceded that the 70-day period had not expired with respect to the charges that appeared in the original indictment but argued, regarding the CCE charge, that "it makes little sense to suggest that speedy trial would be stayed as to charges which did not even exist during this period."

The district court agreed, holding that, under applicable double jeopardy principles, the CCE charge in the superseding indictment must be considered the same as, or required to be joined with, the conspiracy charge in the original indictment, so that the speedy trial clock began ticking for both at the same time: when Roman was

arraigned on the original indictment. The district court also rejected the government's argument that the exclusions granted under the original indictment should apply to the 70-day period for the CCE charge. The court therefore dismissed count two of the superseding indictment with prejudice on November 13, 1986, and, on December 22, 1986, denied the government's motion for reargument and reconsideration.

On this interlocutory appeal the issue is whether the speedy trial exclusions applied to the original indictment should apply as well to a superseding indictment that contains charges which, under double jeopardy principles, are required to be joined with the original charges. Because we conclude that 18 U.S.C. § 3161 should be interpreted to apply the original 70-day clock to the superseding indictment, complete with exclusions, we reverse and remand for further proceedings. We reach our decision based on the language of the statute, the Second Circuit Guidelines Under the Speedy Trial Act, relevant case law, the speedy trial plans of every district court in this circuit, common sense, and sound policy considerations.

DISCUSSION

The Speedy Trial Act requires a criminal trial to begin within 70 days of the later of indictment or arraignment. 18 U.S.C. § 3161(c)(1). *See United States v. Piteo*, 726 F.2d 50, 50 (2d Cir. 1983), *cert. denied*, 466 U.S. 905, 104 S. Ct. 1682 (1984).

Certain periods of delay are excluded in computing the 70-day period. 18 U.S.C. § 3161(h). Exclusions are commonly granted, for example, for the litigation and dispo-

sition of pretrial motions, § 3161(h)(1)(F), or due to the unavailability of a defendant or essential witness, § 3161(h)(3)(A). In addition, the court, on its own motion or at either party's request, may grant a continuance based on its finding that "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(A). Thus, the act requires that the trial of an indicted defendant occur within 70 nonexcluded days from the date on which an indictment is filed, or from the date of the defendant's first appearance before a judicial officer, whichever is later.

Although the Speedy Trial Act contains no reference to a "superseding indictment", which is a second indictment filed before dismissal of the original, or underlying, indictment, there is an instructive provision in the act that covers an analogous situation. Section 3161(h)(6) applies when an indictment is dismissed on the government's motion and another charge "for the same offense, or any offense required to be joined with that offense" is filed. In that situation the act provides that the speedy trial clock is tolled during the period of time after dismissal, when no charges are pending, and on the new indictment the clock resumes from the point at which it stopped when the original indictment was dismissed. 18 U.S.C. § 3161(h)(6). *See United States v. McCown*, 711 F.2d 1441, 1446 (9th Cir. 1983) (under § 3161(h)(6), "the time period is merely tolled during the the period when no indictment is outstanding"). Thus, the statute provides that when reindictment follows dismissal the exclusions of time allowed under the first indictment continue to apply. We can discern no logical reason to apply a different rule

to a superseding indictment simply because it is filed sooner, while the first indictment is still pending.

In addition to the statutory language, the Second Circuit Guidelines Under the Speedy Trial Act are instructive because they focus specifically on superseding indictments. *See United States v. Rojas-Contreras*, 106 S. Ct. 555, 558 (1985) (using the guidelines to resolve the issue of whether the act prohibits commencement of a trial less than 30 days after arraignment on a superseding indictment).

These guidelines indicate that where the original indictment is pending when the subsequent charge is filed and the superseding indictment contains an "offense required to be joined with an originally charged offense", the offenses contained in the superseding indictment shall inherit both the 70-day time clock of the original indictment and the exclusions granted thereunder. The guidelines provide:

> 1. If, after an indictment * * * has been filed, [an] * * * indictment * * * ("subsequent charge") is filed which includes the same offense or any offense required to be joined with that offense ("originally charged offenses"), the time limits * * * applicable to the originally charged offenses will be determined as follows:
>
> * * * *
>
> (c) If the original indictment * * * is pending at the time the subsequent charge is filed, * * * [t]he trial of the originally charged offenses included in the subsequent charge shall commence within the time limit for commencement of trial on the original indictment * * *.

Judicial Council of the Second Circuit, Guidelines Under the Speedy Trial Act II (L)(1)(c) (approved Jan. 19, 1979) [hereinafter Second Circuit Guidelines]. The Comment to guideline II (L) further clarifies the treatment of "originally charged offenses" in a superseding indictment:

> [A]ssume that after [65] days of non-excluded time has run in the arraignment-trial interval and while the first indictment is still pending, a superseding indictment is handed up containing the same charges as well as new ones. Under guideline 1(c) above, the clock stops running until the arraignment on the new indictment has taken place. * * * [F]ollowing the arraignment on the superseding indictment, there are only five (5) days of non-excluded "arraignment-trial" interval time left for trial of those offenses in the superseding indictment that are contained in the original indictment.

Comment, Second Circuit Guidelines, Section II (L). Since the term "nonexcluded time" is used here to describe the original speedy trial days that are carried over to a superseding indictment, the exclusions granted under the original indictment are necessarily assumed to apply to the superseding indictment.

Defendant does not disagree with this analysis but, instead, would simply have this court disregard the Second Circuit Guidelines and in effect invalidate the speedy trial plans of all districts in this circuit. This we decline to do.

Four years after the passage of the original Speedy Trial Act, Pub. L. No. 93-619, 88 Stat. 2076 (1975), *amended by* Pub. L. No. 96-43, 93 Stat. 327, 328 (1979) *and* Pub. L. No. 98-473, 98 Stat. 2167 (1984), the Judicial

Council of the Second Circuit approved the Guidelines Under the Speedy Trial Act "for the guidance of the bench and bar and for the eventual inclusion in the Speedy Trial Act plan of each district court." Foreword, Second Circuit Guidelines. When the guidelines were adopted, the Judicial Council Speedy Trial Act Committee (Mansfield, *J.*, Oakes, *J.*, Gurfein, *J.*) emphasized that, although the guidelines "do not have the force of law * * * they have been drafted by * * * experienced judges, prosecutors, defense counsel, court officials, Speedy Trial Act reporters and academicians and represent their best judgment as to how various provisions of the Speedy Trial Act should be interpreted to achieve its purpose." *Id.* We have since recognized that the guidelines "are entitled to appropriate respect." *United States v. Todisco*, 667 F.2d 255, 260 (2d Cir. 1981), *cert. denied*, 455 U.S. 906, 102 S. Ct. 1250 (1982). *Cf. United States v. Sebastian*, 428 F. Supp. 967 (W.D.N.Y. 1977), *aff'd without opinion*, 578 F.2d 1372 (2d Cir. 1978).

Shortly after the guidelines were approved, the judges of each district in the second circuit adopted speedy trial plans pursuant to congressional directive in the act itself, 18 U.S.C. §§ 3165-68. *See, e.g.*, United States District Court for the Eastern District of New York, *Plan for Prompt Disposition of Criminal Cases*, in Federal Bar Council, *Second Circuit Redbook* 343 (1984). Except for slight variations in language in the plan for the District of Connecticut, every district court in this circuit adopted the language of Second Circuit Guidelines II (L)(1)(c). *See, e.g., id.* Furthermore, these rules, unlike the guidelines themselves, have the effect of law. Given this background, when the guidelines and the statutory language

point in the same direction, as they do here, we are not inclined to strain to arrive at a contrary result.

This circuit's actual treatment of superseding indictments supports our conclusion. Although the issue before this court has not been discussed previously in this circuit, our courts have routinely applied exclusions granted under original indictments to superseding indictments. *See, e.g., United States v. Pagan*, 714 F.2d 225, 226-27 (2d Cir. 1983) (exclusions for pretrial motions under original indictment carried over to superseding indictment); *United States v. Piteo*, 726 F.2d 50, 52-53 (2d Cir. 1983) (court looked to original time clock, with exclusions, to determine if delay of defendant's trial due to joinder of co-defendant in superseding indictment was "reasonable" under § 3161(h)(7)), *cert. denied*, 466 U.S. 905, 104 S. Ct. 1682 (1984); *United States v. Bufalino*, 683 F.2d 639, 646 & n.9 (2d Cir. 1982) (exclusions for motions under original indictment carried over to superseding indictment), *cert. denied*, 459 U.S. 1104, 103 S. Ct. 727 (1983). In some cases where no violation was found, the results might have been different if the exclusions had not applied. *See, e.g., Pagan*, 714 F.2d 225; *Bufalino*, 683 F.2d 639.

The third circuit apparently shares our view on this issue. Where a defendant argued that the 70-day period applicable to the superseding indictment should be calculated from the filing of the original indictment, but that exclusions granted for motions pertaining to the original indictment should not be applied to the superseding indictment, the third circuit rejected the defendant's argument and stated, "[t]he appellant cannot have it both ways: if the Speedy Trial clock starts to run with the filing of the original indictment, it must stop for excludable

delays pertaining to that indictment." *United States v. Novak*, 715 F.2d 810, 813 (3d Cir. 1983), *cert. denied*, 465 U.S. 1030, 104 S. Ct. 1293 (1984).

Roman's argument that this case presents a "hybrid situation" is unconvincing. While conceding that the original 70-day trial clock, with exclusions, attaches when the superseding indictment contains the same charges as the original indictment, and that a new 70-day clock begins to run when the superseding indictment contains a completely new charge, Roman asserts that where the offense charged in the superseding indictment is one required to be joined with the charges in the first indictment, the original 70-day clock should attach *without* exclusions. The rationale offered for this "hybrid" solution is that the offense required to be joined under double jeopardy principles "should have been brought" when the first indictment was filed; therefore, the original 70-day clock applies. The exclusions should not apply, Roman argues, because where the superseding indictment charges a different offense than the original, "there is no basis for presuming that what gave rise to the exclusions under the other charges would have given rise to those exclusions under the new offense".

This attempt by Roman to create a unique slot for his case cannot, however, be harmonized with the result required by the statute when there is reindictment following dismissal. Congress could have distinguished, in 18 U.S.C. § 3161(h)(6), between an indictment containing the same offense as the original and one containing an offense required to be joined with the originally charged offense, but it did not do so. Roman fails to raise any cogent argument why the statutory treatment should

differ merely because the new indictment is filed during the pendency of the original, instead of after its dismissal.

Fairness to a defendant does not require that he be informed, at the time he takes positions regarding exclusions under the original indictment, of all charges that may ultimately be brought against him. On the contrary, Roman's interpretation of the act would, in effect, put pressure on the government to "bring in the original indictment all offenses required to be joined therewith", a result that would misconstrue the purpose and the language of the Speedy Trial Act. As we stated in *United States v. Hillegas*, 578 F.2d 453, 456 (2d Cir. 1978), "[t]he policy and purpose of the Act * * * [is] to expedite the processing of *pending* criminal proceedings, not to supervise the exercise by a prosecutor of his investigative or prosecutorial discretion" (emphasis in original).

The legislative history of the Speedy Trial Act indicates that Congress was concerned with both the rights of criminal defendants and the interests of society in general. The bill's purpose was "to give effect to the sixth amendment right to a speedy trial for persons charged with criminal offenses," S. Rep. No. 93-1021, 93d Cong., 2d Sess. 1 (1974), and "to assist in reducing crime and the danger of recidivism by requiring speedy trials." H. Rep. No. 93-1508, 93d Cong., 2d Sess. 8 (1974). *Accord United States v. Stayton*, 791 F.2d 17, 19-20 (2d Cir. 1986) ("The Speedy Trial Act was designed to effectuate the interests of society in general and of the defendant in particular by ensuring that our courts mete out speedy justice." (citation omitted)); *United States v. Hillegas*, 578 F.2d at 456 n.3 (" 'A defendant who is charged with a violation of the law becomes a burden to society in the sense that his status consumes the time and energy of all components of

the criminal justice system with which he comes in contact: the police, magistrate, clerks of court, probation officers, judges and others.' " (citation omitted)).

As the legislative history and this circuit's interpretation of the purposes of the Speedy Trial Act confirm, congress was concerned generally with the efficient administration of justice, and with that goal in mind, decided that the government's prosecutorial flexibility should remain unfettered in this context. Forcing the government to bring charges prematurely would burden courts with weak cases and with applications for continuances, and thus tend to defeat the public interest and the central purpose of the act. *See Hillegas*, 578 F.2d at 460.

Reversed and remanded.

Appendix D
Order of United States Court of Appeals On Petition for Rehearing and Suggestion for Rehearing In Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 30th day of July one thousand nine hundred and eighty-seven.

UNITED STATES OF AMERICA,
Appellant,

-against-

MARTIN ROMAN,
Defendant-Appellee.

Filed July 30, 1987

Docket No. 86-1521

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellee.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for hearing be DENIED.

Appendix D
Order of United States Court of Appeals
On Petition for Rehearing and Suggestion for
Rehearing In Banc

It is further ordered that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requestd that a vote be taken thereon.

/s/ _____
Elaine B. Goldsmith
Clerk

Appendix E
Decision of United States District Court

UNITED STATES of America,

v.

Martin ROMAN, Defendant.

No. S 86 Cr. 388 (PKL).

United States District Court,
S.D. New York.

Nov. 13, 1986.

Defendant charged with drug offenses brought motion to dismiss count of indictment charging him with managing continuing criminal enterprise. The District Court, Leisure, J., held that continuing criminal enterprise charge contained in superseding indictment was same as, or required to be joined with, conspiracy charge contained in original indictment, and thus, 70-day speedy trial limit as to continuing criminal enterprise charge commenced with date of arraignment on original indictment.

Motion granted.

Rudolph W. Giuliani, U.S. Atty., S.D.N.Y. (Charles G. Labella, Asst. U.S. Atty., New York City, of counsel), for U.S.

Bobick, Joelson & Rochkind, New York City (Kenneth Joelson, of counsel), for defendant Roman.

LEISURE, District Judge:

Indictment 86 Cr. 388, filed May 6, 1986, charged defendant Martin Roman, among others, with conspiracy to violate the narcotics laws as well as possession with intent to distribute heroin. Defendant was arraigned on May 15, 1986. On September 5, 1986, Superseding Indictment S 86 Cr. 388 was filed, restating the charges of the

original indictment against Roman and charging him for the first time with managing a Continuing Criminal Enterprise ("CCE") to distribute heroin in violation of 21 U.S.C. § 848.[1] The CCE charge, Count Two of the superseding indictment, incorporates as predicate acts the conspiracy and distribution charges. Defendant moves to dismiss Count Two on the ground that 70 days have passed without the commencement of trial. 18 U.S.C. § 3161(c)(1).

Speedy Trial Act

Defendant asserts that he was entitled to be tried on the CCE charge within 70 days following arraignment on the original indictment.[2] The Government, on the

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[1] With the exception of the CCE charge, the superseding indictment against Roman is basically unchanged from the original indictment although four of the distribution counts have been upgraded into "school counts" (and two others have been omitted), 21 U.S.C. § 845a, and a forfeiture count has been included, 21 U.S.C. § 853(a). At oral argument, the Government admitted that it would have been possible to bring the CCE charge at the same time as the original charges, since the original and superseding indictments involve the same conduct and evidence.

Defendant argues that the CCE count should be dismissed on the ground that, as a matter of law, the evidence will not prove that Roman received "substantial income or resources" as a result of the conduct of a criminal enterprise, 21 U.S.C. § 848(b)(2)(B). Defendant argues that his receipt of approximately $25,000 falls below the intended Congressional standards. Defendant's Memorandum of Law at 8-11. It is unnecessary to address this issue in view of the following conclusions.

[2] In his Memorandum of Law in Support of his Motion to Dismiss Count Two, defendant also argues that Count Two should be dismissed because the superseding indictment came more than 30 days after his arrest. In his Reply Memorandum of Law, however, defendant conceded that *United States v. Napolitano*, 761 F.2d 135, 137-38 (2d Cir.), *cert. denied*, ____ U.S. ____, 106 S.Ct. 129, 88 L.Ed.2d 106 (1985), is controlling on this issue. *Napolitano* held that

(footnote continued on following page)

other hand, contends that the speedy trial clock with respect to the CCE count did not begin to run until the filing of the superseding indictment. In *United States v. Ramos,* 588 F.Supp. 1223 (S.D.N.Y. 1984), *aff'd,* 779 F.2d 37 (2d Cir. 1985) the Court addressed this issue without deciding it. Following local guidelines, the Court stated that the key issue is whether the subsequent filing contains "'the same offense or any offense required to be joined with' the offense charged in the original filing." *Id.* at 1226-27. See "Guidelines Under the Speedy Trial Act" for the Court of Appeals for the Second Circuit (the "Guidelines"), Para. II(L)(1)(c); "Plan for Prompt Disposition of Criminal Cases" for the Southern District of New York (the "Plan"), Para. 4(d)(2). "[I]f the subsequent filing does charge the same offense or one required to be joined therewith . . . then the speedy trial period commenced with the original filing." *Id.* at 1227[3]

(footnote continued from preceding page)
the 30-day rule requires dismissal only of the charges in the original complaint, even if additional charges not contained in the complaint arise out of the same criminal episode charged in the complaint. *Id.* An exception under *Napolitano,* which is not applicable here, may occur when the subsequent charge merely "gilds" the original one. *Id.* at 138.

[3] Both parties in this case agree that portions of the Guidelines are relevant, and that the issue is whether the CCE count contained in the superseding indictment is properly classified as *the same offense or an offense required to be joined with* the charges in the original indictment. *See* Government's Memorandum of Law at 5; Defendant's Memorandum of Law at 6. The Government has cited a portion of the commentary to the Guidelines which it asserts is controlling. Government's Memorandum of Law at 5. The Guidelines do not have the force of law, but are entitled to appropriate respect. *United States v. Todisco,* 667 F.2d 255, 260 (2d Cir. 1981), *cert. denied,* 455 U.S. 906, 102 S.Ct. 1251, 71 L.Ed.2d 444 (1982). Unfortunately, while the text of the Guidelines refers to "the same offense or any offense required to be joined with that offense" as "originally charged offenses," Guidelines at Para. II(L)(1), the commentary speaks of "original charges" and "new charges." Guidelines at 29-31. Thus, it is

(footnote continued on following page)

Appendix E
Decision of United States District Court

[1] In *Ramos*, the Government argued that the requirements of the Double Jeopardy Clause of the Fifth Amendment determine whether the subsequent filing charges the same offense or an offense required to have been joined with the charges of the original indictment.[4] 588 F.Supp. at 1227. In this case, defendant admits that double jeopardy standards govern. Reply Memorandum at 2. As the *Ramos* court noted, the Second Circuit has yet to construe the term "same offense or [one] required to be joined with that offense." 588 F.Supp. at 1227. The same language, however, appears in the section of the Speedy Trial Act providing for circumstances involving a subsequent indictment. § 3161(h)(6).[5] The Speedy Trial

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(footnote continued from preceding page)
not clear for the purposes of the commentary whether all additional charges should be considered "new charges," or whether only those not required to be joined in the original indictment are "new charges." Moreover, the plain meaning of the text of both the Guidelines and the Plan opposes the Government's interpretation of the commentary to the Guidelines. *Cf. United States v. Rojas-Contreras*, ____ U.S. ____, 106 S.Ct. 555, 559 n. 1, 88 L.Ed.2d 537 (1985) (Blackmun, J., concurring in judgment) ("It is not obvious under the Guidelines whether a modified charge . . . would be treated the same as the original charge. . . ."). Therefore, the commentary to the Guidelines is not dispositive of this case.

[4] In its papers, the Government did not address the question of the applicability of double jeopardy standards. The Government argued that the CCE count is a new charge because: (i) under the CCE count the Government must prove other elements in addition to those required to prove the charges contained in the original indictment; and (ii) the maximum penalties for the charges in the original indictment differ substantially from those resulting from a CCE conviction. Government's Memorandum of Law at 5-6. At oral argument, the Government conceded that double jeopardy principles are relevant.

[5] "The term 'superseding indictment' refers to a second indictment issued in the absence of a dismissal of the first." *United States v. Rojas-Contreras*, ____ U.S. ____, 106 S.Ct. 555, 559, 88 L.Ed.2d 537 (1985) (Blackmun, J., concurring in judgment). Section 3161 does not have a provision directly applicable to superseding indictments. *Id; Ramos*, 588 F.Supp. at 1226.

Act does not define the term, but the legislative history makes clear that it refers to joinder required by "the constitutional doctrine of double jeopardy." S.Rep. No. 96-212, 96th Cong., 1st Sess. 10 (1979) ("[J]ust as the defendant should not profit from delay he can create for his own tactical advantage, neither should the Government."). *Accord United States v. Novak,* 715 F.2d 810, 817 (3d Cir. 1983), *cert. denied,* 465 U.S. 1030, 104 S.Ct. 1293, 79 L.Ed.2d 694 (1984). Thus, the question is whether, within the meaning of the Double Jeopardy Clause, the charge contained in the superseding indictment is the same as, or required to be joined with, charges contained in the original indictment. 715 F.2d at 817.[6] *See also United States v. Simms,* 508 F.Supp. 1175, 1177 (W.D.La. 1979) (Superseding indictment charged substantially the same offenses, and therefore defendant must still be tried within the period of time required from the date of the original indictment); *United States v. Bergdoll,* 412

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[6] Several other courts have recognized that under certain circumstances the trial date for additional charges in a superseding indictment may be measured according to the date of the original indictment; these courts, however, have applied tests other than those suggested by double jeopardy principles. *See, e.g., United States v. DeTienne,* 468 F.2d 151, 155 (7th Cir. 1982), *cert. denied,* 410 U.S. 911, 93 S.Ct. 974, 35 L.Ed.2d 274 (1973). ("[I]f the crimes for which a defendant is ultimately prosecuted really only gild the charge underlying his initial arrest . . . [then] the initial arrest may well mark the speedy trial provision's applicability as to prosecution for all the interrelated offenses."). *DeTienne,* however, was decided before the "required to be joined with" language was enacted. *Ramos,* 588 F.Supp. at 1228. *See also United States v. Andrews,* 790 F.2d 803, 809 (10th Cir. 1986); *United States v. Nixon,* 634 F.2d 306, 309 (5th Cir.), *cert. denied,* 454 U.S. 828, 102 S.Ct. 120, 70 L.Ed.2d 103 (1981); *United States v. Peters,* 587 F.2d 1267, 1275 (D.C.Cir. 1978). In view of the legislative history discussed above and of the inherent uncertainty of these alternative tests, reference to double jeopardy standards is appropriate.

The one Court that has reached a directly contrary conclusion on this issue clearly overlooked the legislative history discussed above. *United States v. Hencye,* 505 F.Supp. 968, 971 (N.D.Fla. 1981).

F.Supp. 1308, 1320 (D.Del. 1976) (Additional charge of CCE in the superseding indictment does not alter speedy trial rights of defendant; "[o]therwise, the government, by manipulating the grand jury process, could defeat defendants' speedy trial rights by the mere charade of new indictments.")[7]

[2] The Double Jeopardy Clause offers a defendant two basic protections: It protects against multiple prosecutions for the same offense after acquittal or conviction, and it protects against cumulative punishment for the same offense. *Ohio v. Johnson*, 467 U.S. 493, 498, 104 S.Ct. 2536, 2540, 81 L.Ed.2d 425 (1984) (citations omitted). In this case, defendant contends that the CCE charge should be considered the same offense as, or required to be joined with, both the distribution and conspiracy counts of the original indictment. *See* Defendant's Memorandum of Law at 5. Thus, in resolving the speedy trial issue here according to double jeopardy principles, there are four distinct questions.

Is the CCE charge considered the same as, or required to be joined with, the original indictment's charge of:

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[7] *Cf. United States v. Jorn*, 400 U.S. 470, 486, 91 S.Ct. 547, 557, 27 L.Ed.2d 543 (1971) (Harlan, J.) (Delay of trial implicates policies underpinning both the double jeopardy provision and the speedy trial guarantee); *United States v. Ottley*, 439 F.Supp. 587, 591 (S.D.N.Y. 1977) (acknowledging relationship between double jeopardy provision and speedy trial prosecutions as restraints on prosecutorial discretion).

In stating that it would be "absurd" to start the speedy trial clock on a charge *required* to be joined in the original indictment before such charge was in fact "returned by the grand jury," Government's Memorandum at 4, the Government ignores the prosecutor's relationship to the grand jury. "The contemporary grand jury investigates only those whom the prosecutor asks to be investigated, and by and large indicts those whom the prosecutor wants to be indicted." M. Frankel & G. Naftalis, *The Grand Jury: An Institution on Trial* 100 (1977).

(1) *distribution*, under the protection against
  (a) multiple prosecutions? or
  (b) cumulative punishment?
(2) *conspiracy*, under the protection against
  (a) multiple prosecutions? or
  (b) cumulative punishment?

(1)(a) Regarding the double jeopardy protection against multiple prosecutions, the critical inquiry is whether the CCE offense is considered the "same offense" as one or more of its predicate offenses. *Garrett v. United States*, 471 U.S. 773, 105 S.Ct. 2407, 2415, 85 L.Ed.2d 764 (1985); *cf. United States v. Persico*, 620 F.Supp. 836, 844 (S.D.N.Y.), *aff'd*, 774 F.2d 30 (2d Cir. 1985). Roman argues that both the distribution and conspiracy predicate charges are lesser included offenses under the CCE count, and that the Government would thus be prohibited from trying defendant for the greater offense after convicting him of the lesser one. *Brown v. Ohio*, 432 U.S. 161, 168-69, 97 S.Ct. 2221, 2226-27, 53 L.Ed.2d 187 (1977). In *Garrett*, 105 S.Ct. at 2415-19, however, the Supreme Court clearly rejected precisely this argument with respect to substantive offenses such as possession with intent to distribute, 21 U.S.C. § 841(a)(1). The Court stated that Congress' intent to create the CCE as a separate offense "could hardly be clearer." *Id.* at 2413. Moreover, the Court stated that it would be "illogical" to construe the statute to require the Government to choose between prosecuting the predicate offenses and the CCE violation. *Id.* at 2415. "Quite obviously the CCE offense is not, in any commonsense or literal meaning of the term, the 'same' offense as one of the predicate offenses." *Id.*

(1)(b) *Garrett* also resolves the second issue. The Court stated that "logic supports the conclusion, also indicated by legislative history, that Congress intended separate punishments for the underlying substantive

predicates and for the CCE offense." *Id.* at 2420. *Accord United States v. Mourad*, 729 F.2d 195, 203 (2d Cir.), *cert. denied*, 469 U.S. 855, 105 S.Ct. 180, 83 L.Ed.2d 114 (1984).

(2)(a) The third issue concerns the relationship between the conspiracy charge, 21 U.S.C. § 846, and the CCE count for the purpose of the double jeopardy protection against multiple prosecutions. It was unnecessary for the Court in *Garrett* to decide this issue, as the defendant there challenged only the use as a predicate offense of his prior conviction for marijuana importation and his consecutive sentences for that substantive offense and the CCE charge. 105 S.Ct. at 2411. An earlier plurality opinion also failed to reach this issue. *Jeffers v. United States*, 432 U.S. 137, 155, 157, 97 S.Ct. 2207, 2218, 2219, 53 L.Ed.2d 168 (1977).

One Circuit Court of Appeals, however, has interpreted the *Garrett* opinion as extending to cases involving conspiracy as a predicate offense. *United States v. Grayson*, 795 F.2d 278, 285 (3d Cir. 1986) (Rationale and conclusions of *Garrett* are equally applicable to predicate conspiracy offense.) Other circuits have rejected this interpretation of *Garrett*, however. *United States v. Burt*, 765 F.2d 1364, 1368-69 (9th Cir. 1985) (distinguishing between predicate substantive offenses and conspiracy); *United States v. Erwin*, 793 F.2d 656, 669 & n. 20 (5th Cir. 1986) (same); *United States v. Boldin*, 772 F.2d 719, 730-31 (11th Cir. 1985), *modified on other grounds*, 779 F.2d 618 (11th Cir.), *cert. denied*, ____ U.S. ____, 106 S.Ct. 1269, 89 L.Ed.2d 577 (1986) (same); *United States v. Schuster*, 769 F.2d 337, 341, 344 (6th Cir. 1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 1210, 89 L.Ed.2d 322 (1986) (same). The Court of Appeals for the Second Circuit has yet to apply *Garrett* in the CCE context, *cf. United States v. Persico*, 774 F.2d 30, 32 (2d Cir. 1985), but its prior decisions indicate that it would reject the Third Circuit's expansive view of *Garrett*.

Prior to *Garrett*, the Second Circuit clearly distinguished between conspiracy and substantive predicates for a CCE charge. *Mourad*, 729 F.2d at 202-03. Moreover, it has repeatedly been held in the Second Circuit that conspiracy is a lesser included offense under a CCE charge. *United States v. Young*, 745 F.2d 733, 749-50 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084, 105 S.Ct. 1842, 85 L.Ed.2d 142 (1985) (Conspiracy is a lesser included offense of CCE "in the purest form."). *See also United States v. Sperling*, 560 F.2d 1050, 1055 (2d Cir. 1977) (These two offenses are "the same in law and in fact."); *United States v. Estrada*, 751 F.2d 128, 133-35 (2d Cir. 1984), *cert. denied*, ____ U.S. ____ , 106 S.Ct. 97, 88 L.Ed.2d 79 (1985); *United States v. Martinez-Torres*, 556 F.Supp. 1255, 1260-65 (S.D.N.Y. 1983). In the absence of clear language to the contrary, this Court must follow *Young*, which reaffirmed *Sperling*. 745 F.2d at 750.[*] Thus, for the purpose of the double jeopardy protection against multiple prosecutions, the CCE charge must be considered the same as the conspiracy charge.

(2)(b) *Garrett* approved the plurality view in *Jeffers* that Congress did not intend to impose cumulative penalties under §§ 846 and 848. 105 S.Ct. at 2420; 432 U.S. at 157, 97 S.Ct. at 2219. In addition, the Second Circuit had clearly reached this result prior to *Garrett*. *See Mourad*, 729 F.2d at 202.

[3, 4] In view of the foregoing conclusions regarding double jeopardy principles, the CCE charge contained in the superseding indictment must be considered the same as, or required to be joined with, the conspiracy charge contained in the original indictment. The 70-day speedy

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[*] In a letter dated November 12, 1986, the Government conceded that "the conspiracy count charged in the indictment is a lesser included offense within the charge of managing a continuing criminal enterprise ('CCE')."

trial limit thus commenced with the date of arraignment on the original indictment.[9]

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[9] The Government has argued principally that the 70-day period for commencement of trial on the CCE charge began at the time of the filing of the superseding indictment. Government's Memorandum of Law at 4-5. This position resulted from the conclusion that the CCE count was "a new charge and not an offense required to be joined with the charges contained in the original indictment." *Id.* at 5.

The Government, however, has also argued—assuming the 70-day period as to the CCE charge began at the time of arraignment on the original indictment because the CCE offense was required to be joined with the original charge—that the 70-day period for the CCE count still has not elapsed. *Id.* at 6. This conclusion rests on the premise that exclusions of time under § 3161(h) which had been applied to the charges actually appearing in the original indictment should also toll the 70-day period as to the CCE charge, which was required to be joined in the original indictment, but appeared for the first time in the superseding indictment.

Defendant argues that the 70-day period for commencement of trial began with arraignment on the original indictment, and that the 70 days following the arraignment should be counted without regard to exclusions of time which were applied to the charges of the original indictment before the superseding indictment was filed. Reply Memorandum at 3-4.

In support of its retroactive tolling argument, the Government has relied on *Ramos*, 588 F.Supp. at 1228. This reliance, however, is misplaced. In calculating the time which had expired, from March 2 to May 9, 1986, prior to the filing of the superseding indictment, the Court simply counted each day without regard to any exclusions of time. *Id.* The only exclusions of time which the Court considered were applied after the filing of the superseding indictment. *Id.* In this case, nearly four months passed from the arraignment on the original indictment on May 15 to the filing of the superseding indictment on September 5, 1986.

The Government has also relied on provisions of the Guidelines, at Para. II(L)(1)(c), and the Plan, at Para. 4(d)(2) (The trial "shall commence within the time limit for commencement of trial on" the original indictment.) While these provisions can be construed as *implying* that retroactive tolling occurs, they do not explicitly address

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Appendix E
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(footnote continued from preceding page)
the issue. Particularly as to waivers by the defendant under § 3161(h)(8), which are among the exclusions that were applied to the original indictment, the treatment proposed by the Government would be patently unfair. Defendant has asserted, "[H]ad this CCE count existed from the beginning defendant's entire posture toward insisting on an immediate trial would have changed." Reply Memorandum of Law at 4. It is possible, for example, that defendant would have moved for severance under § 3161(h)(7). Defendant has also maintained that the presentation of his case would have been enhanced by a more expeditious trial on the CCE charge. In any event, the Government's position entails "an exercise in speculation that this court should not have to engage in." *Id.*; *Cf. United States v. Tunnessen*, 763 F.2d 74, 78 (2d Cir. 1985) (citing dangers of retroactive application of exclusion of time under § 3161(h)(8)). Moreover, the Government should not now benefit from exclusions of time that were applied to the original charges while the Government stood by without action regarding a CCE offense. *Cf. United States v. Nixon*, 779 F.2d 126, 131 (2d Cir. 1985) (It would be "unfair" for defendant "to benefit retroactively" from silence regarding change of position); *United States v. Bufalino*, 683 F.2d 639, 646 (2d Cir. 1982), *cert. denied*, 459 U.S. 1104, 103 S.Ct. 727, 74 L.Ed.2d 952 (1983) (Defendant "had a duty to do more than stand by without taking a position and then reap the benefit of inaction. . . ."). Acceptance of the Government's premise would substantially vitiate the prosecutor's incentive to bring in the original indictment all offenses required to be joined therewith. In view of these considerations, the Government's interpretation of the Guidelines and the Plan is not persuasive. *See also supra* note 3; *cf. Avis Rent A Car System, Inc. v. Hertz Corp.*, 782 F.2d 381, 385 (2d Cir. 1986) ("Fundamental to any task of interpretation is the principle that text must yield to context.") (Friendly, J.).

Defendant concedes that the 70-day period has not run out with respect to charges actually contained in the original indictment. Defendant's Reply Memorandum of Law at 3.